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IN THE

SUPREME COURT OF THE UNITED STATES

OCT. TERM, 1965

No. 580

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on May 18, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 345 Fed.2d 917 and is attached hereto as Appendix A.

The Federal Power Commission's opinion, No. 420, and order issuing license appears at J.A. 648–702 and its order modifying that opinion and denying the hearing is at J.A. 772–781.*

* J.A. refers to the Joint Appendix filed in the Court of Appeals and filed herewith as the certified record of the proceedings below. The numbers refer to pages in the Joint Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1965. A timely petition for rehearing was denied on June 22, 1965. The jurisdiction of this court is invoked under section 313(b) of the Federal Power Act.

QUESTIONS PRESENTED

The questions presented herein are:

1. Whether section 10(a) of the Federal Power Act requires the Federal Power Commission to examine all facets, including all costs and benefits, of a project in order to carry out its duty and responsibility to determine whether the project applied for is "best adapted to a comprehensive plan for improving and developing a waterway."

STATUTES INVOLVED

The Federal Power Act of June 1920, 41 Stats. 1067, as amended, 16 U.S.C. section 791(a) et seq., provides in part as follows:

> "Section 10(a)(16 U.S.C. § 803(a)) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce for the improvement and utilization of water power development and for other beneficial public uses including recreational purposes; and if necessary, in order to secure such plan, the Commission shall have author-

ity to require the modification of any project and of the plans and specifications of the project works before approval."

STATEMENT OF CASE

A. Procedure

The Federal Power Commission (hereinafter referred to as Commission) commenced a hearing on Project No. 2299 on October 16, 1962, and concluding on October 26, 1962. The Turlock Irrigation District and Modesto Irrigation District (hereinafter called applicants) were joint applicants for license (J.A. 672). The State of California was an intervenor for all purposes. The Secretary of Interior, the Banta Carbona Irrigation District and County of Tuolumne were intervenors for limited purposes (J.A. 651). The Commission issued its Opinion No. 420 and Order issuing license on March 10, 1964 (J.A. 648–702). Petitions for Rehearing were filed by the State of California within the time allowed (J.A. 762–771). On May 6, 1964, the Commission denied all petitions for rehearing and modified its Opinion No. 420 and Order issuing license in a manner not in issue in the case at bar (J.A. 772–781).

The State of California, the Turlock and Modesto Irrigation Districts and the United States, acting through the Secretary of Interior, all filed petitions for review in the Court of Appeals for the Ninth Circuit. On May 18, 1965, the Court denied all of said petitions and affirmed the decision of the Federal Power Commission (Appendix A).

B. Facts

The applicants for license in this matter seek a license from the Federal Power Commission to construct the New Don Pedro Project on the Tuolumne River. The New Don Pedro Project consists of a dam and appurtenant powerhouses approximately 1 and ½ miles downstream from the existing Don Pedro Dam and Powerhouse (J.A. 649–650). The New Don Pedro Project will create a reservoir of 2,030,000 acre feet of gross storage; 340,000 acre feet of storage space will be utilized for flood control, 811,000 acre feet will be used for irrigation, and 570,000 acre feet will be used to satisfy the City and County of San Francisco's responsibility to the applicants for license under the Raker Act (38 Stats. 245 (1913)). Water stored in the New Don Pedro Reservoir will be released downstream and diverted for irrigation use at La Grange Dam (J.A. 650–651).

The project will cost approximately $92 million. The applicants' share of this cost is approximately $49 million and the City and County of San Francisco's share is approximately $43 million (J.A. 191, 365–371). The applicants' share of the project costs will be repaid out of power revenues (J.A. 48–52). The applicants market power to consumers within their boundaries and the cost to the consumers might have to be increased only slightly if at all. Thus the power benefits to the applicants approximate their share of the cost of the project.

There is no evidence as to how the City and County of San Francisco's share of the project costs will be repaid. There is likewise no evidence of the value of the benefits of the project to the City and County of San Francisco. Such evidence was excluded by the Commission (J.A. 187, 671–672). Therefore there is no way to compare the City and County of San Francisco's share of the costs of the project with the value of the benefits which it receives from the project.

Applicants will utilize the waters conserved by the New Don Pedro Project for the production of power and for irrigation of lands within their districts. The project will enable the districts to firm up their water supply during dry years and over a period of time will result in an approximate gain of 200,000 acre feet per year over their existing ability to divert water (J.A. 190). The New Don Pedro Project will enable the City and County of San Francisco to approximately double their ability to divert water from the Tuolumne River for the production of power and municipal purposes. The City and County of San Francisco with its present storage facilities could divert 210 mgd. The New Don Pedro Project will enable them to divert approximately 400 mgd. (J.A. 197–199).

In years past, the Tuolumne River has supported large runs of king salmon. Over the period of record, 1940 through 1961, the size of the runs has varied greatly, from approximately 500 to 130,000 salmon

(J.A. 346). The average size run over this period has been approximately 40,000 (J.A. 78–79). From 1953 through 1959 the Tuolumne River produced about 6 per cent of all of the salmon originating in California (J.A. 65). The value in dollars to the commercial fishing industry alone of the run of 40,000 salmon is in excess of $1,000,000.00 (J.A. 69–70).

The run of king salmon in the Tuolumne River is dependent upon water being released from Don Pedro Reservoir and passing La Grange Dam which is the downstream diversion structure used by the irrigation districts to divert water into their systems. The New Don Pedro Project would enable the irrigation districts and the City and County of San Francisco to divert water from the river which is presently available for the production of salmon (J.A. 82–83, 349).

After hearing the Commission determined that water releases for the protection of the king salmon involved should be made. The releases ordered by the Commission were those recommended by the State of California (J.A. 661, 681). The Commission, however, substantially modified the recommended releases through the device of providing a dry year schedule which will apply in approximately one out of every four years and which is based upon the operation of the New Don Pedro Project and the upstream reservoirs of the City and County of San Francisco rather than upon hydrologic conditions in the watershed (J.A. 661–662). The Commission further modified the

recommended releases by requiring them only for the first twenty years of project operation (J.A. 681). After the first twenty years the Commission provided only for flows which would be determined upon that time, placing the burden upon the State of California and the United States of America to show the necessity for the continuance of such flows and the availability of water to maintain them (J.A. 682).

REASONS FOR GRANTING THE WRIT

The writ should be granted to prevent the Federal Power Commission from destroying a natural resource, with an annual value in excess of $1,000,000, while at the same time refusing to comply with the Federal Power Act so that the king salmon resource of the Tuolumne River might be saved. Since the Federal Power Commission's opinion and order were affirmed by the United States Court of Appeals, our attention is primarily directed to the decision of the Commission.

The Commission's order, instead of protecting this resource as it should do pursuant to section 10(a) of the Federal Power Act, has in fact limited the remaining life of this natural wildlife resource of king salmon to a period of 20 years. The Commission's order in this regard requires minimum conditions for the preservation of this fishery resource for this 20-year period, but fails to require any such conditions for the remaining period of the license (30 years). The Commission has, therefore, doomed to destruc-

tion for all time following the 20 years, a resource which cannot be replaced in any manner or means.

The peculiar vice of the Commission's order is that it has done so without any consideration of the entire aspects of the project. The New Don Pedro Project, as proposed, will be paid for approximately one-half by the Modesto and Turlock Irrigation Districts and one-half by the City and County of San Francisco. The power benefits derived from this project which go to the Modesto and Turlock Irrigation Districts were examined by the Commission. The irrigation benefits flowing from this project were not considered.

In addition to this, the benefits accruing to the City and County of San Francisco, who are paying for approximately 50% of the project, were not considered at all. The Court of Appeals, in its decision, found that fulfillment of its duty under section 10(a) of the Federal Power Act *requires* the Commission to consider the benefits that San Francisco will derive from the project (citing *Chapman* v. *Federal Power Comm'n,* 345 U.S. 153, 168).

The court, however, concluded that the Commission had adequately performed its duty. This conclusion was apparently based upon the assumption that after 20 years the Commission could require suitable conditions and impose these conditions upon the Turlock and Modesto Irrigation Districts under the assumption that San Francisco would contribute its fair share of the costs involved and that San Francisco's fair share would be determined by an examination,

at that time, of the benefits derived from the project by San Francisco. The problem contained in the court's conclusion, however, is that no one can compel San Francisco to agree to assume this burden. San Francisco was not a party to the proceedings before the Commission or to the proceedings before the Court of Appeals and will not be a party to any proceedings held 20 years from now.

The Court of Appeals and the Federal Power Commission have both fallen into the error of assuming that San Francisco will willingly share in the responsibility for the maintenance of the natural resources of the Tuolumne River. This assumption is not justified by the record. We submit that these responsibilities must be fixed now.

Without question, San Francisco is going to benefit at least commensurately with its investment of $43 million. Its fair share of the measures necessary to protect the salmon resource involved should also be commensurate with the benefits flowing from the project. The latter could be assured in either of two ways. San Francisco could be required to become a joint applicant for the license and thereby subject to the jurisdiction of the Commission even after a 20-year period, or license conditions, based upon San Francisco's benefits, could presently be imposed upon the irrigation districts which would necessitate an agreement between the districts and San Francisco prior to the construction of the project.

It is fair neither to the United States or the State of California, who share in the ownership of the salmon resources involved, nor to the Turlock and Modesto Irrigation Districts, to have decisions of this magnitude deferred for a period of 20 years and after the expenditure of some $92 million. It is particularly unfair to the State of California and the United States since it is unlikely that the Federal Power Commission is going to be willing or able to impose burdens at that time upon the Turlock and Modesto Irrigation Districts which might adversely affect the feasibility of their completed project.

The Commission and the Court of Appeals also erred in the selection of a definition of a "dry year." Flow releases required during the first 20 years of the project are based upon schedules for "normal" and "dry" years. The releases in a "dry year" are only about one-half of those needed to maintain the salmon runs.

The State of California in its presentation of evidence and recommendations proposed a definition for a dry year which is substantially in accord with the hydrologic conditions of the watershed. It is under these hydrologic conditions that the king salmon run of the Tuolumne River developed. The Commission staff after the close of the hearing and in its briefs proposed a definition for a dry year. This definition

is based upon the actual inflow to the New Don Pedro Reservoir. The actual inflow to the New Don Pedro Reservoir, of course, results from the combined operation of the New Don Pedro Reservoir and the upstream reservoirs of the City and County of San Francisco. The dry year definition and the application of the schedule of releases thereunder which are approximately 50 per cent of the normal releases results in the reduction of the releases for fishery protection by approximately one half. It is not realistic to allow a project sponsor to control the amount of water which he must release for fishery protection purposes through the operation of his project. In this sense what the Commission has done is to give the licensees and the City and County of San Francisco the ability and the option to increase their revenues and decrease the protection for the king salmon run by approximately 50 per cent simply through the application of an operation schedule which will accomplish this. The Commission has found that a run of 40,000 salmon should be protected and has found the amount of water required for that purpose. To thereafter say that only half that amount of water need be released, dependent upon the operation of the project, conflicts with their other findings and has no rational basis in the record or in logic.

CONCLUSION

It is respectfully requested that this petition for writ of certiorari be granted.

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Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

State of California; Turlock Irrigation District, California, and Modesto Irrigation District, California, United States of America on the relation of Stewart L. Udall, *Petitioners,* vs. Federal Power Commission, *Respondent.*	No. 19,394

[May 18, 1965]

On Petition to Review an Order of the Federal Power Commission

Before: CHAMBERS, HAMLEY and BROWNING, Circuit Judges

HAMLEY, Circuit Judge:

This is a proceeding to review two Federal Power Commission orders granting a license for the multipurpose New Don Pedro project on the Tuolumne River in California. The petitioners are the Turlock and Modesto Irrigation Districts, the Secretary of the Interior (Secretary), and the State of California (state). The districts, which had jointly applied for the license, complain of terms and conditions attached to the license imposed for the protection of salmon runs. The Secretary and the state, on the other hand, assert that those terms and conditions are not sufficiently far-reaching.

The nonnavigable Tuolumne River rises in the Sierra Nevadas above the Hetch Hetchy Valley. By the time it reaches the San

Joaquin Valley floor at La Grange, the river drains an area of about 1540 square miles. From La Grange it runs for some fifty miles to its confluence with the San Joaquin River, with the Turlock district on one side and the Modesto district on the other. The river has extreme variations in annual flow, ranging from 3,204,300 acre feet in 1938 to 600,300 in 1924. A high flow is usual in March to June, followed by very little run-off.

The two districts were formed in 1887. At that time they had a combined acreage of 257,000 acres, roughly two thirds in the Turlock district and one third in the Modesto. Rainfall in this area averages only twelve inches annually, ninety percent of which is in the winter months. The storage and diversion of surface water is therefore essential to successful agriculture. The Tuolumne is the only source of surface water available to the districts.

The districts initially purchased prior appropriative rights, dating back to 1855, to the use of Tuolumne River waters. They supplemented these rights by direct appropriations filed under California law in 1889 and 1890. The districts constructed the La Grange diversion dam in 1894, the off-stream Modesto Reservoir in 1911, and the off-stream Turlock Reservoir in 1914.

Early in the twentieth century, the City and County of San Francisco sought rights of way from the United States in Yosemite National Park so that it could establish storage in the headwaters of the Tuolumne, to support the diversion of water for domestic use in the San Francisco Bay area. The result was the enactment of the Raker Act, 38 Stat. 242 (1913).

In the Raker Act, Congress granted San Francisco the rights of way it needed. This grant, however, was made subject to the observance, by the grantee, of certain enumerated conditions. One of these is that the grantee shall recognize the specified prior right of the Turlock and Modesto irrigation districts. This was the right to receive 2,350 second feet of the natural flow of the Tuolumne measured at the La Grange Dam, ". . . whenever the same can be beneficially used. . . ." by the districts for the irrigation of three hundred thousand acres of land. Section 9, 38 Stats. at 246. During a sixty-day period beginning on April 15 of each year, San Francisco is, under this statute, required to recognize the right of the districts to the extent of four thousand second feet.

San Francisco initiated its activity in the upper Tuolumne watershed in the 1901 to 1911 period, posting notices of appropriations of water under California law and conducting surveys. The city intensified this activity following passage of the Raker Act, a system being planned to export ultimately four hundred million gallons a day (mgd) to the Bay area. In 1918, the city completed Lake Eleanor Reservoir, having a capacity of 27,100 acre feet. In 1923 it completed O'Shaughnessy Dam, impounding 206,000 acre feet in Hetch Hetchy Reservoir.

In the same year the districts constructed the original Don Pedro project, impounding about 290,000 acre feet at a site five miles upstream from La Grange Dam. O'Shaughnessy Dam was altered in 1935 to 1938 and 1949 to a capacity of 360,360 acre feet. In 1956 San Francisco completed Cherry Valley Dam, impounding 268,200 acre feet in Lake Lloyd.

In 1951, the districts made application to the state for water right permits covering storage and diversion for irrigation use necessary to the construction of the New Don Pedro project. The New Don Pedro Dam would be downstream of Don Pedro Dam, and would flood out the latter structure.

It would have a maximum height of 580 feet and would create a reservoir extending twenty-two miles up the Tuolumne having a gross storage capacity of 2,030,000 acre feet. Of this, 310,000 acre feet would be for a minimum pool and 340,000 acre feet would be dedicated to flood control. In addition, 570,000 acre feet would be available as exchange storage in which San Francisco could store water to satisfy the Raker Act entitlements of the districts. This would make it possible for San Francisco to make the necessary diversions to its upstream aqueduct to maintain a dependable supply in its Bay area system. The remaining storage capacity would be utilized by the districts in serving their needs.

The project involves a power plant with a peaking capability of 150,000 kilowatts, such production to be surbservient to the operation of the project for the other purposes described above. In addition to the purposes already mentioned, the districts contemplated a recreational development of the reservoir in coördination with interested federal, state and county agencies. It was also proposed that the project be operated so as to provide in the fall and winter months as much water as possible for salmon in the stream below the La Grange diversion dam.

The total cost of the project is estimated at $92,415,850. San Francisco has entered into an agreement with the districts to contribute to the cost of the project an amount to be based on the cost of constructing a dam and reservoir with a storage capacity of 1,200,000 acre feet, exclusive of cost of power facilities and lands. San Francisco's contribution is estimated at $43,181,790. The districts propose to finance their share of the cost, estimated at $49,334,060, by the sale of bonds.

Lands of the United States in the public domain would be used in the construction and operation of the project. Therefore the districts needed to obtain from the Federal Power Commission a license to construct and operate the project, notwithstanding the fact that the Tuolumne is not navigable. See section 4(e) of the Federal Power Act, 49 Stat. 839 (1935), 16 U.S.C. § 797(e) (1958); *F.P.C. v. Oregon*, 349 U.S. 435, 442-443.

The districts filed a joint application for such a license. A proceeding before the Commission was thereupon instituted, and the state immediately intervened in that proceeding. The Secretary and others sought to intervene at a later stage in the proceeding. The latter were granted limited intervention for the purpose of making an opening statement, cross examining witnesses, and filing briefs and exceptions.

After proceedings before an examiner, the latter issued an initial decision. The districts, state, Secretary and the Commission's staff filed exceptions. After oral argument, the Commission, on March 10, 1964, filed its Opinion No. 420 and order, issuing a fifty-year license to the districts subject to certain terms and conditions The districts, state and Secretary applied for a rehearing. On May 6, 1964, the Commission entered an order modifying the earlier order, and denying the application for rehearing. This review proceeding was then commenced.

The questions presented here relate, for the most part, to the inclusion, among the terms and conditions of the New Don Pedro project license, of Article 37, pertaining to the release of waters to maintain fish runs below the New Don Pedro Dam. This article provides that, for the first twenty years of the project operation, the districts shall maintain minimum stream flows in the Tuolumne River at La Grange Bridge (river mile 50.5) for fish run purposes in accordance with a table set forth in the article.

The table lists the number of cubic feet per second (cfs) and the number of acre feet to be released during specified periods of each year, depending upon whether the immediately preceding year is a "normal" year (schedule A) or a "dry" year (schedule B). The total acre feet to be released in a year immediately following a "normal" year is 123,210 acre feet, and immediately following a "dry" year, 64,040 acre feet. A "normal" year is defined as any year ending on October 1 in which the inflow into New Don Pedro Reservoir equals or exceeds one million acre feet. A "dry" year is defined, in like manner, as one in which such inflow is less than one million feet. Schedule B, applicable immediately after a "dry" year, is also made subject to the proviso quoted in the margin.[1]

Article 37 also contains the following provision stating what is to happen at the end of the twenty-year period:

> "After the first 20 years of project operation, the Licensees shall maintain minimum stream flows in the Tuolumne River at La Grange bridge as may be prescribed hereafter by the Federal Power Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the California Department of Fish and Game, after notice and opportunity for hearing and upon a finding based on substantial evidence that such minimum flows are available and are necessary and desirable and consistent with the provisions of the Act."

The districts contend that Article 37 impairs the irrigation uses of the districts covered by water rights acquired under California law, and that the Commission is without authority to impair those rights. Counsel for the Commission does not, on this review, take serious issue with the districts' contention that Article 37 could operate to impair full use of their irrigation water rights. Instead, counsel defends the Commission's authority, under the circumstances, to attach a condition to the New Don Pedro project which may have that result.

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[1] "*Provided*, that in a water year when the inflow is less than 750,000 acre feet, the amount of water provided under Schedule B shall be reduced by a percentage of the total acre feet equivalent to the percentage reduction in the gravity diversion at La Grange by the Licensees. For this purpose, the diversion shall be defined as 900,000 acre feet to Licensees."

In its opinion and order of March 10, 1964, the Commission declined to pass upon the legal question of the Commission's authority in this regard because, in its view, the fish releases required under Article 37 are not ". . . expected to interfere with such rights [the districts' water rights] during the first 20 years of operation, . . ." Elsewhere in that opinion and order, and in its order of May 6, 1964, the Commission seems to state, rather categorically, that the fish release requirements of Article 37 will not limit the districts' planned use of its irrigation water rights for at least twenty years.

But in other of its statements in these two orders the Commission discloses that its expectations in this regard might not be realized. The Commission indicates that its judgment in the matter is based in part upon the assumption that the past hydrologic cycle is a generally representative pattern for the future, and that it has taken into consideration the districts' "average irrigation yield." The Commission's last statement on the subject is that, in making fish releases for twenty years as specified in Article 37, the districts ". . . are giving up considerable value in terms of . . . the unrestricted use of the water for irrigation."

Still more significant is the Commission's statement, in its order of May 6, 1964, that the districts' present irrigation needs are about one million acre feet a year ". . . and these needs should continue at about 1,000,000 acre feet a year for the foreseeable future. . . ." Inasmuch as the proviso of Article 37 specifically provides for fish releases, although in reduced amounts, even when the gravity diversion at La Grange by the districts falls below nine hundred thousand acre feet, it would seem that Article 37 specifically contemplates fish releases which may take water the districts will need for irrigation.

The Commission indicates, in its order of May 6, 1964, that if circumstances develop calling for application of the proviso to Article 37, and reduced releases therein called for are not sufficient to meet the districts' needs:

> ". . . the applicants would have to seek a modification of the license requirements to meet the emergency. We do not expect this situation to arise, but if it should we would consider such modification of the license to the extent shown to be necessary in the public interest."

The Commission thus indicates that it is aware of the great importance to the districts of having water sufficient to meet their irrigation needs, no matter how this may affect the fish release program. But the agency also makes it clear that should such an unanticipated conflict of interest arise, it would deal with the question in the context of the public interest. Presumably this could lead to a result different than would be called for by a strict recognition of the districts' irrigation water rights unless, when it came to deal with the problem, the Commission should conclude, as a matter of law, that the districts' rights must prevail.

So analyzing the potentials inherent in Article 37 and the Commission's announced way of administering it, we are convinced that a determination of the legal question as to the Commission's authority should have been made by the Commission and must, in any event, be made on this review. As before indicated, both the districts and counsel for the Commission have argued the question on the merits and make no contention that the proceeding should be remanded to the Commission for an initial adjudication on the point.

The districts' present exercise of their irrigation water rights through utilization of existing facilities is not actually or potentially impaired by the Commission order. But the districts propose to augment their exercise of those rights by the construction and operation of facilities which will include a power project and which will be located, in part, upon the public lands of the United States. It is this circumstance which required the districts to apply to the Commission for a license.

In granting such a license the Commission is required, under section 10(a) of the Federal Power Act, 49 Stat. 842 (1935), as amended 16 U.S.C. § 803(a) (1962), to consider all beneficial public uses including recreational uses. Under that section, and under section 4(g) of the Act, 16 U.S.C. § 797(g) (1958), the Commission is made the "guardian of the public domain." *F.P.C. v. Idaho Power Co.*, 344 U.S. 17, 23. The issuance of a license can be justified only on the theory of a resulting benefit to the public. *Alabama Power Co. v. F.P.C.*, D.C. Cir., 128 F.2d 280, 288-289.

The districts rely upon section 27 of the Federal Power Act, 41 Stat. 1077 (1920), 16 U.S.C. § 821 (1958), as precluding the Commission from attaching conditions to the license which may impair use of their irrigation water rights, even though such

conditions may be appropriate under section 10(a) of that Act.[2] In *Portland General Electric Co. v. F.P.C.*, 9 Cir., 328 F.2d 165, 176-177, we held that section 27 did not stand in the way of the Commission in imposing navigation conditions in a license pursuant to section 11 of the Federal Power Act, 41 Stat. 1070 (1920), 16 U.S.C. § 804 (1958).

In our opinion the same principle governs where conditions in a license are imposed pursuant to section 10(a). It is true that in the *Portland* case the basis of Commission authority is the navigability of the water in question, while here the basis of Commission authority is the fact that public lands will be affected. This might make a difference if the issue presented were whether the consent of California was required with regard to the provisions made for the conservation of anadromous fish. See *F.P.C. v. Oregon*, 349 U.S. 435. But California makes no such contention here and the districts are as opposed to state restrictions as they are to federal restrictions.

The districts also argue that section 29 of the Federal Power Act, 41 Stat. 1077 (1920), 16 U.S.C. § 823 (1958), providing that nothing contained in that act shall be held or construed to modify or repeal any of the provisions of the Raker Act, precludes the Commission from imposing a license condition which may impair their irrigation water rights.

The districts, however, will continue to receive the flows guaranteed to them under the Raker Act as long as they are content with their present facilities. That act did not give them the right to use the public lands they now wish to utilize in connection with the New Don Pedro project. With regard to those public lands, the districts are in the same position as any other applicant for a license—if they are to use those lands they must accept the reasonable restrictions and obligations attached thereto.

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[2] Section 27 reads:

> "§ 821. State laws and water rights unaffected
>
> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

We therefore conclude that the Commission had authority to incorporate in the tendered license a condition which could operate to impair the districts' full use of their irrigation water rights in some future year. The likelihood that circumstances will occur during the next twenty years which will, in fact, present such a problem seem remote. The prospect that, if such circumstances do arise, the Commission will solve the problem in a manner which will deprive the districts of essential irrigation requirements is speculative. Should such an eventuality come to pass, any such Commission action will be subject to review as to the sufficiency of the evidence to support findings upon which such action is based, and as to whether the action is arbitrary and capricious. But we now hold that the Commission has the legal authority to take appropriate action restricting the use of such irrigation rights, should the occasion arise.

The districts argue that the Commission violated section 6 of the Federal Power Act, 49 Stat. 841 (1935), 16 U.S.C. § 799 (1958), by ordering the issuance of a license which did not state all of its terms and condictions. Section 6 provides, in relevant part, that licenses issued under the Act shall be issued for a period not exceeding fifty years and upon terms and conditions ". . . expressed in said license." The section further provides that a license may be altered or surrendered only upon mutual agreement between the licensee and the Commission.

The asserted violation of section 6 is brought about by the provision of Article 37 which requires that, after the first twenty years of operation, the districts shall maintain such minimum stream flow at La Grange Bridge as may be then prescribed by the Commission after further proceedings to be held at that time.

The districts indicate that certainty sufficient to overcome this section 6 objection will be achieved only if the license guarantees them a specific dependable power capacity in kilowatts for the entire fifty-year license period, indicating that this should be not less than 73,000.

In its second opinion and order the Commission made the statement set out in the margin concerning the purpose and scope of any modification of the initial release requirement which might

be made at the end of the twenty-year period.[3] In our view Article 37, read in the light of the quoted statement, definitely establishes that whatever curtailment in irrigation and municipal purposes may be found legally and factually supportable at the end of the twenty-year period, no fish release will be required after that date which will impair the continuing economic feasibility of the project.

The section 6 requirement that the terms and conditions of a license be expressed in the license must not be given a construction which is impracticable of application. When the Commission reasonably foresees the possibility that a need may develop years in the future requiring, in the public interest, the imposition of a burden upon the licensee at that time, but either the dimensions of the need or the way of meeting it is not presently ascertainable, the license terms cannot possibly speak with definiteness and precision concerning the matter. Under these circumstances, it is sufficient, under section 6, to include in the license a condition reserving the problem, including the licensees' rights to test the validity of any future action taken.

The principle applicable here is analogous to that which obtains in determining whether the Commission order must contain specific findings of fact as to future conditions. We dealt with that problem in *Portland General Electric Co.* v. *F.P.C.*, 9 Cir., 328 F.2d 165, 175. We there held that it is not arbitrary, unreasonable, or a deprivation of due process to refrain from making findings as to what conditions may be in the future, at least where no present burden is imposed.

In its opinion of March 10, 1964, the Commission indicated that it could not now evaluate with assurance a number of factors

[3] "Opinion No. 420 clearly states that the releases which the applicants are now required to make will be subject to modification at the end of the 20-year period to assure the continuing feasibility of the New Don Pedro project; there is no assurance, however, that the applicants and San Francisco will thereafter be free to use the waters of river for irrigation and municipal purposes without limit. For the reasons spelled out in Opinion No. 420, the allocation of river waters which will best serve the public interest within the limits permissible under law appropriately should and will be made when and if the need for such allocation arises."

which should be considered in determining the kind of fish release program which will be needed during the last thirty years of the license period.[4] We find no basis in the record before us for holding that the Commission has overstated these present uncertainties.

In light of these circumstances the provision of Article 37, giving notice of the prospective reëxamination of the fish release problem at that time and outlining procedures to be followed in the interim looking to the development of a proper solution, provide as much precision and definiteness in this regard as it presently practicable. We therefore hold that there has been no violation of section 6 of the Federal Power Act in the respect asserted.

The districts contend that the specification of releases was totally unnecessary in the face of the Commission's own expectations, as stated in its opinion of March 10, 1964, quoted in the margin.[5]

We do not read the quoted statement as meaning that, even without prescribed releases the fish will be assured of sufficient water until 1985. The Commission was discussing the adequacy of water, not the need of imposing release requirements to assure that the available water would be released for fish runs. This is

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[4] The factors mentioned are: vagaries of the weather, possible alternative sources of water for the purpose of preserving fish runs, development of other techniques such as fish hatcheries for preserving fish runs, possible destruction of the Tuolumne fishery by changes in flow downstream from La Grange by causes beyond the control of the districts, possible reduction in the districts' irrigation requirements due to increased urbanization and industrialization or by the development of more efficient methods of utilizing water, and the possibility of reduced interest rates on the districts' bonded indebtedness.

[5] ". . . we do not seriously question the applicants' contention that even without such a condition the salmon runs would be preserved longer with New Don Pedro than with existing Don Pedro. On the basis of the record, we would expect that New Don Pedro could be operated without adverse effect on the salmon runs until after 1985, when San Francisco's upstream diversions reach 295 mgd; whereas without New Don Pedro it appears that the fish would be seriously affected, if not destroyed, after 1968, when San Francisco's diversions reach 210 mgd."

made clear by the Commission's further statement which immediately follows that quoted in note 5.[6]

The districts argue that the Commission's findings of fact are inadequate for purposes of court review. They urge that the Commission did not say how the releases in the amounts prescribed could be justified, ". . . it simply summarized in one paragraph the California contentions about salmon requirements (R. 3896) and then stated that its analysis of the record showed California's studies to be 'reasonable.'" Even then, the districts state, the Commission qualified this by adopting the staff's "inflow" rather than California's "natural flow" formula, in language that recognized that California's claims for salmon were overstated. The Commission makes no response in its brief to this argument about the clarity of the findings.

The rule the districts here invoke is that there must be clarity and completeness in the basic or essential findings on which administrative orders rest. *Colorado-Wyoming Gas Co. v. F.P.C.*, 324 U.S. 626, 634. Or, as the District of Columbia Court of Appeals recently said in *Government of Guam v. Federal Maritime Commission*, 329 F.2d 251, 255, ". . . the reviewing authority is entitled to know—indeed must know—the basic data and the whys and wherefores of the Commission's conclusions."[7]

The findings of the Commission made in support of its fish releases, as stated in its opinion of March 10, 1964, are entirely sufficient with regard to: (1) the average run of salmon which ought to be protected, (2) the number of spawning salmon which must be provided for each year to protect the average run, (3) the number of square feet of spawning gravel required for each spawning salmon, and therefore the total amount of square footage required.

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[6] "This evidence, however, does not substantiate the applicants' contention that no fish water releases should be required in the New Don Pedro license. In our judgment such releases are required as hereinafter prescribed if the projects [sic] is to be found to be best adapted to a comprehensive plan for development of the waterway, since only by making the releases a condition of the license can we be sure that the project will be operated so as to utilize the available water in the best interest of all parties and provide the best plan for comprehensive development for all public uses."

[7] See also, section 8(b) of the Administrative Procedure Act, 60 Stat. 242 (1946), 5 U.S.C. § 1007(b).

With regard to the amount of river flow necessary to support spawning called for under these three factors, the table of releases set out in Article 37 represents an adequate and express finding. Nowhere in the report does the Commission state the facts as to how this required river-flow figure was computed. The opinion does, however, indicate that the Commission accepted California's computations as to this. The only element of the latter computation which the districts appear to question is the low-flow figure for the test period during a survey conducted by the California Department of Fish and Game and the United States Department of the Interior. This low-flow figure is ascertainable from exhibits and testimony referred to in the briefs.

We therefore hold that the Commission findings are adequate for our purposes in reviewing the agency orders. This being true, the adequacy of the findings in other respects is immaterial, especially in view of the fact that, in their petition for rehearing filed with the Commission, the districts did not complain as to the adequacy of the findings. See section 313(b), Federal Power Act, 49 Stat. 860 (1935) as amended, 16 U.S.C. § 825 1(b); *Utah Power & Light Co. v. F.P.C.*, 10 Cir., 339 F.2d 436, 438.

The districts contend that with regard to the annual amount of water releases necessary to accommodate eighty thousand salmon within the area found to be required, the findings of the Commission are not supported by substantial evidence.

This is true, the districts assert, because there inheres in California's proposed water release schedule, accepted in substance by the Commission, two assumptions of fact which are contrary to the evidence. One of these is the assumption that, during the test period referred to above, the low flow was 160 cubic feet per second, whereas it was actually 130 cubic feet per second. The other is the apparent assumption that there were no substantial accretions to the river which maintain a live stream regardless of releases at La Grange, whereas the fact is to the contrary.

With regard to the first of these points the evidence is sufficiently in dispute so that we are unable to say that the Commission erred in accepting the larger figure. Moreover, the Commission recognized that California's studies were "conservative" in some respects, and allowed for this by modifying, in the direction of reduced releases, the use to be made of the "normal year" and "dry year" schedules.

Concerning the failure of California to take accretions into account, there is reason to believe that this could not have been an important factor during the October to March period when spawning occurs. Accretions are for the most part the result of application of irrigation water to the lands on both sides of the stream bed and there is little irrigation in progress during the spawning season. The Commission indicated that it was aware that accretions had not been taken into consideration and allowed for it by ordering the modification referred to above.

Having in view the highly technical nature of the fact determinations in question and the judgment factors which were involved, both calling for expertise which the Commission has, and this court does not, we conclude that the findings referred to above are supported by substantial evidence sufficient to withstand attack on this review.

Finally, the districts contend that the evidence does not support the Commission's finding that enough water should be released during the twenty-year period to accomomdate eighty thousand salmon.

The Commission based this determination on its findings that the fish run which ought to be protected averages forty thousand salmon a year, and that to maintain this average the spawning grounds must be large enough to provide for up to eighty thousand adult fish each year, of which forty percent will be female. The districts' challenge runs to both of these findings.

The determination of the average run to be protected was based upon the best information available as to actual runs for past years. That information is adequate to support a protectible average run of forty thousand if the run of 130,000 in 1944 and the run of 120,000 in 1940 are included. A protectible average run of about twenty-five thousand fish would be indicated if the years prior to 1950 were excluded. The run was only five hundred in 1961, two hundred fifty in 1962 and one hundred in 1963.

In deciding how many past years should be taken into consideration in determining the protectible average, the Commission was required to make judgment determinations not subject to challenge here unless plainly arbitrary. We find no basis for holding that the Commission was arbitrary in providing for the protection of spawning on a scale which would reverse the downward trend in recent years.

On the other hand if, after a period of five years or so, under the Article 37 release schedule, the actual fish run has dwindled to but a fraction of the forty thousand hypothetical average, the districts ought to have the opportunity to seek a reopening of the fish release terms and conditions. We do not construe the Commission orders as foreclosing this opportunity. As of the present time, however, we conclude that the finding in question is supported by substantial evidence.

The finding that, in order to protect an average spawning run of forty thousand, the spawning grounds must be large enough to provide for up to eighty thousand adult fish, is also supported by substantial evidence.

We turn now to the questions raised on this review by both California and the Secretary although, to some extent, these have already been discussed in dealing with the issues presented by the districts.

The first of these is whether the Commission erred in limiting the release schedule set out in Article 37 to the first twenty years of the fifty-year license period.

At the outset of this argument the Secretary and California call attention to various federal and state statutes manifesting legislative concern with the preservation of fish and wildlife resources.[8] The Secretary also asks us to bear in mind the magnitude of the fishery values involved.[9]

These petitioners argue that if the fish resources of the Tuolumne are to be saved, it must be done now by fixing adequate terms and conditions for that purpose which will be effective throughout the fifty-year license period. This is, they assert, the normal procedure, applicants being required ordinarily to demonstrate at the time of the application proceedings that the project

[8] The Secretary and the state cite the following statutes: Fish and Wildlife Act of 1956, 70 Stat. 1119-1124, as amended, 16 U.S.C. §§ 742-a-742j (1958); Fish and Wildlife Coördination Act, 48 Stat. 401-402 (1934) as amended, 16 U.S.C. §§ 661-666c (1958); California Water Code § 1257; California Fish and Game Code § 1505.

[9] Experts testified that, during the period from 1953 to 1959, the Tuolumne River produced annually approximately 463,000 pounds of commercial salmon in California. On the average there are 2,600 commercial salmon fishermen, 1,330 salmon fishing boats, and thirty processing plants for salmon in California.

will be economically feasible for the entire license period having in view all expenditures necessary to preserve fish resources.

Petitioners cite numerous examples in which investor-owned utilities have been required to make substantial sacrifices, determined in advance, to finance fish facilities, hatcheries and fish ladders. The implication is that the irrigation districts and the City and County of San Francisco ought to receive similar treatment. If this determination is to be postponed for twenty years, they urge, there will then be in existence a new and overpowering circumstance, namely, the physical presence of the multimillion dollar New Don Pedro Dam and appurtenant works, which will prejudice freedom of action in providing for the preservation of fish runs.

All of these and other considerations of like nature were urged upon the Commission. But that agency had to consider the whole picture. While these petitioners say that construction of the new project will present the Commission with a *fait accompli* which will limit freedom of action at the end of the twenty-year period, the fact is that the Commission is already faced with a *fait accompli*. The districts and San Francisco are now free to operate the presently-existing river structures in a manner which will not protect fall fish runs. The prospect is that if the new project is not constructed, the entire Tuolumne fish run will be destroyed in the near future.

If this danger is to be averted, the Commission had to devise terms and conditions of a kind which the districts and San Francisco, balancing all of their present rights and future needs, could reasonably be expected to assume. They cannot be required to accept a license and they are not likely to if, in their considered judgment, the terms and conditions attached thereto threaten the economic feasibility of the project or substantially impair water rights assiduously acquired and developed through the years.

The districts introduced credible evidence tending to show that, whatever the situation is now, in twenty years when San Francisco increases its diversion for municipal purposes to 295 mgd, there will not be sufficient water for the districts' irrigation needs if they are required to continue releases on the scale called for in Article 37. This alone was sufficient to justify the Commission in limiting the releases to that period, subject to review in the manner indicated in Article 37.

If, because of insufficient Tuolumne water, further Tuolumne releases should not be ordered after that date, alternatives such as a fish hatchery system may prove feasible, depending on need and economic feasibility. In our view the present form of Article 37 is adequate to enable the Commission to deal with the problem as it then exists and to impose such burdens on those who are in fact and law subject thereto, as the then-indicated solution requires.

Only the districts are licensees and any order the Commission may enter twenty years from now pursuant to Article 37 will therefore necessarily be directed only to them. This does not mean, however, that the districts, as licensees, may be immune from burdens justified because of the value of the New Don Pedro project to San Francisco.

Under section 10(a) of the Federal Power Act, 16 U.S.C. § 803(a), the Commission is required to measure each proposed project against an objective comprehensive plan for the optimum coördinated development of the entire waterway. See *United States ex rel. Chapman v. F.P.C.*, 345 U.S. 153, 168. Fulfillment of that duty in this case necessarily requires the Commission to consider the benefits San Francisco will derive from the project.

We think the Commission adequately performed this duty, insofar as present purposes are concerned, when it accepted San Francisco's agreed monetary contribution to the project, arrived at after arm's-length bargaining between the districts and San Francisco as the measure of the latter's economic benefit from the project.

Under Article 37, the duty of the licensees with regard to fish releases is fixed for only the first twenty years of the license period, and this Article appears to provide for maximum use of the water available for fish releases or other conservation purposes during that period. The project, as licensed, is engineered to take advantage of the entire storage capability of the area, having in view the natural topographic configuration. The only way in which storage capacity could be increased would be to run a ring dike entirely around the reservoir.

There is thus no reasonable possibility, and indeed no contention, that had specific evidence pertaining to the economic value of the project to San Francisco been received, it might have warranted the Commission in requiring that storage capacity be

enlarged for fish release or other conservation purposes by constructing such a dike. Nor is there reason to believe that, during that period, other measures such as the construction and operation of fish hatcheries will be needed.

It follows that, for this initial period, Commission inquiry into the question of the economic value of the project to San Francisco, in all likelihood, would not have enabled the agency to make any more favorable order, insofar as conservation is concerned, than it has already entered.

However, when it comes to the question of determining what needs to be done to protect the public interest during the last thirty years of the license period, a problem which the Commission, under Article 37, has reserved, the Commission will undoubtedly require additional evidence as to the benefits accruing to San Francisco. The Commission orders should not be construed as foreclosing such an inquiry.

With respect to any burdens imposed upon the districts at that time and as may be warranted by the value of the project to San Francisco, the districts will be entitled to reimbursement from San Francisco. Whether or not the districts and San Francisco already have, or hereafter enter into an agreement making clear their respective rights and obligations in such an eventuality, the position in which they have placed themselves before the Commission requires this result. San Francisco must be deemed to have acceded to this principle if it proceeds with its commitments under the New Don Pedro project.

The Secretary further argues that, under section 23(b) of the Federal Power Act, 49 Stat. 846 (1935), 16 U.S.C., § 817, San Francisco was a necessary joint applicant for the license, and the Commission erred in not requiring it to assume that status in the case. Under that section it is unlawful, among other things, for any person, state or municipality, for the purpose of developing electric power, to construct dams and the like upon any public lands of the United States, except under a license granted by the Commission. The Secretary contends that although San Francisco will not be a legal owner of the project, it is a direct beneficiary thereof, and so comes under the sanction of section 23(b).

We do not believe that section 23(b) is to be so broadly construed. San Francisco not only has no proprietary interest in

the project works, but as the Commission found, it has no interest whatever in the power to be developed at New Don Pedro. Any upstream benefits which it may realize, as the Commission further found, ". . . will be only incidental to the main purpose of its participation, which is to acquire additional municipal water storage."

As long as the Commission requires the districts, as actual legal owners of the project works, to obtain a license, and as long as the duties and obligations imposed upon those owners, as licensees, take into account all the monetary benefits to be derived by anyone from the project, the public interest is fully protected and the purpose of section 23(b) is achieved. We have indicated above that the Commission must take account of the benefits derived by San Francisco from the New Don Pedro project when it reviews the fish run problem as provided for in Article 37. We have also held that the Commission may at that time impose burdens upon the districts warranted by the benefits derived by San Francisco on the assumption that the latter will reimburse the districts for any such expenditures.

The Secretary and California have presented several additional arguments. Among these are the Secretary's contention that the Commission erred ". . . in wholly ignoring water quality and pollution problems," and in failing to consider the impact which Article 37 might have on the Federal Central Valley Project.[10] The state argues that the selection of a "dry" year definition by the Commission is not based upon evidence or reason, and the Commission failed to provide, in Article 40 of the terms and conditions, sufficient control over the temperature of the water releases.

We have reviewed each of these arguments, and others not mentioned above, and conclude that the Commission did not err with regard to any of them.

The orders under review are affirmed.

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[10] The Secretary in his petition for intervention mentioned neither of these contentions.

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STATE OF CALIFORNIA }
COUNTY OF SACRAMENTO } ss.

AFFIDAVIT OF SERVICE BY MAIL

MARY JANE HURST, being duly sworn, deposes and says: That affiant is a citizen of the United States, over the age of 18 years, and not a party to the within action; that affiant's place of employment and business address is ~~County and County Building~~, Rm.500, Wells Fargo Bank Bldg. Fifth Street and Capitol Mall, Sacramento 14, California;

That on the 15th day of September, 1965, affiant enclosed a true copy of the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

in an envelope for each of the persons named below, addressed to each of them at the address set out immediately below each respective name, sealed said envelope, and deposited the same in the United States Mail at the City of Sacramento, County of Sacramento, State of California, with postage thereon fully prepaid; that there is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the said place of mailing and each of the places so addressed:

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Mary Jane Hurst

Subscribed and sworn to before me,
this 15th day of September, 1965.

Marlene Knobloch
NOTARY PUBLIC in and for the County of Sacramento, State of California.

MARLENE KNOBLOCH
NOTARY PUBLIC
STATE OF CALIFORNIA
COUNTY OF SACRAMENTO
My commission expires Mar. 16, 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 591

TURLOCK IRRIGATION DISTRICT, CALIFORNIA AND MODESTO IRRIGATION DISTRICT, CALIFORNIA, *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

TURLOCK IRRIGATION DISTRICT, CALIFORNIA AND MODESTO IRRIGATION DISTRICT, CALIFORNIA, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Turlock Irrigation District, California and Modesto Irrigation District, California, pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit affirming orders of the Federal Power Commission imposing a certain condition in a license to Petitioners for a water resources development in California.

OPINIONS BELOW

The opinion of the Court of Appeals (R 785-803),[1] reprinted herein as Appendix A, is reported at 345 F. 2d 917. The orders of the Federal Power Commission issued March 10 and May 6, 1964 (31 FPC 510, 1128) appear in the Joint Appendix (JA 648, 772).

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1965 (R 805). A timely petition for rehearing was denied on June 22, 1965 (R 807). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1), and 16 U.S.C. § 825*l*(b).

QUESTIONS PRESENTED

The Federal Power Commission granted Petitioners Turlock and Modesto Irrigation Districts (hereinafter "Districts") a 50-year license to construct the $92,000,000 New Don Pedro project on the Tuolumne River (a wholly intra-state, nonnavigable California stream), proposed primarily for the conservation of waters for use by the Districts and San Francisco for essential irrigation and municipal requirements pursuant to uncontested rights long held by these public bodies under California law and confirmed in the Raker Act of 1913 (38 Stat. 242). Article 37 of the license, however, imposes a twenty-year schedule of fixed water releases for salmon which will impair such

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[1] "R" refers to the record as certified to this Court by the Court of Appeals. "App." refers to the appendix to this petition. "JA" refers to the Joint Appendix filed in the Court of Appeals, transmitted to this Court with the certified record, nine additional copies of which have been filed with this petition.

rights; and provides no limit on the impairment that the Commission may order after the twenty-year period. The Ninth Circuit affirmed, holding that Section 10(a) of the Federal Power Act authorizes the Commission in licensing a project to invade State granted consumptive use water rights, and vests it with full authority to further invade such rights in the future. The questions presented are:

1. Whether Sections 10(a) and 27 of the Federal Power Act and the Desert Land Act save State granted rights to the use of waters for irrigation purposes from being superseded and reallocated to other uses by the Federal Power Commission in licensing a project affecting public lands on a nonnavigable stream.

2. Whether the Federal Power Commission is bound by the express allocations of Tuolumne River waters confirmed by Congress in the Raker Act, in view of the terms of Section 29 of the Federal Power Act prohibiting the Commission from modifying or repealing any of the provisions of the Raker Act.

3. Whether the Federal Power Commission on issuing a license must advise the applicants as to the extent their vested irrigation rights may be impaired by the Commission during the license term under Section 6 of the Act requiring all of the essential terms and conditions of the license to be set forth for the entire 50-year license period.

4. Whether an order of the Federal Power Commission asserting unlimited power to take the vested irrigation and municipal use rights held by a license applicant and others without compensation, as a condition to receiving a license, violates the Fifth Amendment to the Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the United States Constitution; Section 1 of the Desert Land Act, 19 Stat. 377 (1877), as amended 43 U.S.C. § 321; Sections 6, 10(a), 27 and 29 of the Federal Power Act of 1920 (41 Stat. 1067, 1068, 1077; as amended 16 U.S.C. §§ 799, 803(a), 821, 823); and the Raker Act of 1913 (38 Stat. 242) are set forth in Appendix B. (App. p. 24a)

STATEMENT

This case was considered by the Court of Appeals for the Ninth Circuit pursuant to the direct review provisions contained in Section 313(b) of the Federal Power Act (16 U.S.C. § 825*l*(b)).

Districts' Irrigation Uses. The Districts, located on either side of the Tuolumne River (see map, Appendix C (App. p. 47a)), were formed in 1887 as public agencies of the State of California by farmers for the purpose of constructing irrigation systems to promote the settlement and cultivation of arid lands in the Central Valley. They set out at once to develop the Tuolumne as the only source of water available to them. Their present combined acreage has changed little from the slightly under 260,000 acres originally within their boundaries.

The Districts' water rights to the use of the Tuolumne are among the oldest in the West. They purchased prior appropriative rights dating back to 1855, which they supplemented by direct appropriations under California law filed in 1889 and 1890, and by other applications made to the State (See App., pp. 2a, 19a-20a; JA 342). In 1894 the Districts constructed La Grange dam, replacing an earlier structure, for the purpose of diverting the natural flow of the Tuo-

lumne by gravity flow to the farms within the districts, through a series of main canals and laterals which now have a combined length of over 400 miles (JA 11-12). In 1913, when Congress in enacting the Raker Act authorized San Francisco's development of the upper Tuolumne, the Districts were diverting the entire flow of that river at La Grange dam in the late summer and fall months for irrigation (H. Rep. No. 41, 63rd Cong. 1st Sess. 12-13 (1913).

The existing Don Pedro project (which New Don Pedro would inundate) was planned at the time of the Raker Act, authorized through a permit issued by the Secretary of Interior in 1916, and completed in 1923 to a storage capacity of 290,000 acre feet.[2] Through this and two offstream reservoirs completed prior to the Raker Act, the water encompassed in the Districts' rights has been put to beneficial use for irrigation purposes. Most of the irrigable lands within the Districts have long been developed, maintaining the present level of between 260,000 and 270,000 irrigated acres (including double crops) annually since at least 1950.[3] The proposed New Don Pedro project is not designed to develop new lands but to permit the continued irrigation of properties already developed, from a dependable supply, while permitting increased up-

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[2] Existing Don Pedro includes a power plant of 37,500 kilowatts of installed capacity. The installation of drum-type gates in the spillway in 1929 backed up the water some 9 feet higher than the description included in the Secretarial permit. Application to FPC in 1930 resulted in the issuance of minor part license No. 1086 to cover the raised portion.

[3] The Districts had a gross crop value in 1961 of $48,000,000 representing two-thirds of the crop value of Stanislaus County, which ranks eighth in the Nation in agricultural production and first in certain specialty crops (JA 456-457, fn. 17).

stream diversions by San Francisco for municipal uses in the Bay area.

San Francisco's municipal uses. The City and County of San Francisco initiated its activity in the upper Tuolumne watershed in the 1901-1911 period, posting notices of appropriation under California law which claimed over 400 million gallons a day (mgd) and conducting surveys for reservoirs, tunnels and pipelines to convey water to the Bay area for municipal use (JA 36-42). Since the natural flow of the Tuolumne had been previously appropriated by the Districts, San Francisco's rights were to flood flows to be captured by holdover storage reservoirs.

The Raker Act of 1913 authorized San Francisco to construct the facilities sought, but in Section 9 of that Act Congress expressly guaranteed that the irrigation rights of the Districts would be protected, the Act's author stating on the House floor that the bill gave the Districts ". . . a solemn guaranty that they will always have water for their 300,000 acres of land." (50 Cong. Rec. 3904 (1913)). In addition the legislative history of the Act is clear that Congress contemplated that the City would make full use of Tuolumne River waters beyond the Districts' entitlements to enable it to supply up to 400 mgd for the needs of residents of the San Francisco Bay area through the end of this century.

San Francisco's Hetch Hetchy system[4] presently

[4] The system includes three storage reservoirs: Hetch Hetchy 360,360 acre feet, Lake Eleanor 27,100 acre feet, and Lake Lloyd (Cherry Valley) 268,200 acre feet. The waters come down out of the mountains through 35 miles of tunnels, completed in 1929 to a capacity in excess of 400 mgd; thence across the San Joaquin valley floor in pipelines which now have a combined capacity of 295 mgd; and through the 28 mile Coast Range tunnel, completed in 1934, into the local distribution system.

serves a population of over 1,650,000. The existing storage, however, will permit an upstream diversion of only 210 mgd estimated as required to serve population needs by 1968. Diversions beyond that and up to the 400 mgd for which the conveyance tunnels were completed over 3 decades ago will require almost twice as much storage to serve the anticipated population of 3,370,000 persons by the year 2010. San Francisco looks to the New Don Pedro project to make this essential storage available by 1968 (JA 34).

The New Don Pedro project. Planning by the Districts and the City for the project commenced in the 1930's. Congress in 1944 approved a payment to the project for 340,000 acre feet of flood control storage space in the reservoir (in lieu of authorization of a conflicting federal project), which was implemented by a contract entered into between the Army Corps of Engineers, the Districts and the City in 1949.[5] Also in 1949, the Districts and San Francisco entered an agreement relating to the proposed construction and operation of the project consistent with their rights under the Raker Act. By this agreement 570,000 acre feet in New Don Pedro would be available to San Francisco as exchange storage, with the City to pay about half of the construction costs, thus enabling the City to meet the Districts' Raker Act entitlements while making upstream diversions beyond 210 mgd to

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[5] Flood Control Act of 1944, 58 Stat. 887, 901; Committee Document No. 2, House Committee on Flood Control, 78th Cong., 2d Sess. (1944); Ex. 10, JA 290, JA 14-15.

maintain a dependable supply in its Bay area system (JA 13-14).[6]

In January 1951, the Districts made application to the State for a consumptive use storage and diversion right permit related to their plan of operating the project. Public notice of this application was given, including express notice to the California Department of Fish and Game, but no protest or objection thereto was made. Thereafter, on March 27, 1953, the State issued a permit to the Districts for the project without any fish release conditions. Funds for the project were subsequently assured through elections in which the voters of both the City and the Districts approved the issuance of bonds (JA 5).

Proceedings before the Federal Power Commission. In May 1961, the Districts filed an application with the Federal Power Commission for a license for the

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[6] Other project provisions include a minimum pool of 309,000 acre feet to be maintained at all times for recreation, fish and wildlife and power purposes (JA 17). The remaining space in the 2,030,000 acre foot reservoir (the maximum possible for the geology of the site—App. p. 21a, JA 510) will store the Districts' irrigation water although studies show that there will still be years in which the farms of the Districts will be short of water (JA 456-57, fn. 17). While the project works include a power plant of 130,000 kilowatts installed capacity, the generation to be completely used in the public distribution system which the Districts own and operate, power is fully subordinated to conservation operations for irrigation and municipal uses, and flood control (App. p. 4a). Finally, operations are planned to carry over spring flood flows to the maximum possible extent so that releases can be made downstream in the fall and winter months at the time desired for any spawning salmon which enter the stream (*Ibid.*). But for the power facilities, no Commission license would be required. *East Bay Municipal Utility Dist.*, 27 F.P.C. 499 (1962).

project.[7] The State of California "acting through its Department of Fish and Game" intervened (JA 395-398). The Secretary of the Interior on the eve of the hearing intervened in support of California Fish and Game (JA 420-423). It was in these Federal proceedings that the fish interests sought for the first time to undercut the consumptive uses of water for irrigation and municipal use by the Districts and San Francisco.

The primary issues at the hearing held in October 1962 related to measures alleged as necessary for any king salmon which might spawn in a 17-mile reach of the river below La Grange dam (4 miles downstream of the project boundary) in the fall and winter months. The Districts were willing to release all water not required for irrigation and municipal uses in a manner most beneficial to fish. California Fish and Game and the Secretary, however, wanted water released downstream for fish as a first mortgage on the river, regardless of the impact of such releases on irrigation and municipal uses. They proposed a schedule for water releases for the October-April period to support an assumed run of 80,000 salmon,[8] requiring release

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[7] San Francisco did not join as a party to the proceeding upon Commission advice that this was unnecessary in view of the Districts' ownership of the facilities (JA 380-383).

[8] The mathematical average from 1940-1961 is 40,000 salmon. The average from 1947-1961 is 25,000. No run since 1948 has exceeded 46,000 and runs of only 500 were experienced in 1961, 250 in 1962 and 100 in 1963 (App. p. 17a).

of 123,210 acre feet per year in "normal" years and 64,040 acre feet in "dry" years.[9]

The Examiner, in a decision issued June 4, 1963, proposed the issuance of a license unconditioned by any set fish releases, finding that since the releases sought would reduce the irrigation supply available to the Districts in critical years below that available from their existing Don Pedro project, such a license condition was clearly prohibited by Section 27 of the Act (JA 493-94).

On review the Commission reversed the Examiner and ordered a license issued to the Districts with Article 37 thereof requiring the releases sought by California Fish and Game and Interior with minor modification, for a 20-year period, the releases thereafter to be determined by the Commission at that time.[10]

In its opinion affirming the Commission's orders, the Ninth Circuit held that under Section 10(a) of the Federal Power Act, the Commission could impair the irrigation and municipal uses involved and reallocate that water to fish, regardless of the conflicting adjudication under the California Water Code and the subjection of the Commission to State control of such

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[9] App. p. 5a. 123,000 acre feet amounts to about 110 mgd, enough to supply a city of 883,000 people for a year, or enough water to irrigate over 30,000 acres of land.

[10] The Commission imposed the fish release in spite of its findings that under existing conditions with the present structures on the river, there would be no flow in the river below La Grange dam after 1968 for fish, (the river thus reverting to its 1913 condition at the time of passage of the Raker Act); and that the Districts' operations without any set fish release would not adversely affect fish for at least 20 years (JA 657). The project will greatly enhance the river for fish over existing conditions for the entire fifty year license period (JA 112-116).

uses by Section 27 of the Federal Power Act, and regardless of the express guarantees of flows to the Districts in the Raker Act recognized by Section 29 of the Federal Power Act. The court further held that the Federal Power Commission has unlimited jurisdiction in the future to reallocate the Districts' and San Francisco's vested irrigation and municipal consumptive uses to fish and that the Districts are not now entitled to know the extent of that possible impairment under Section 6 of the Power Act, before accepting the license.[11] In the court's view, the vested irrigation and municipal use rights involved can be preserved from unlimited future impairment only by foregoing construction of the New Don Pedro project. Inasmuch as the primary purpose for the expenditure of $92,000,000 of public funds is to conserve water for essential consumptive uses by people with the evidence clear that the fish releases in time will mean less water from the new project than the Districts get from their existing Don Pedro, the Districts seek review of the decision by this Court.

REASONS FOR GRANTING THE WRIT

I. The holding below that the Federal Power Commission on issuing a license can impair irrigation and municipal use rights on nonnavigable streams acquired under State law and reallocate that water to other uses conflicts with the principles of prior decisions of this Court and poses an important issue vitally affect-

[11] The only restriction imposed by the court is that "no fish release will be required . . . which will impair the continuing economic feasibility of the project," (App. p. 12a) but this would provide no guarantee as to the continued availability of Tuolumne system waters upon which the Districts and San Francisco are completely dependent.

ing the proper spheres of Federal-State jurisdiction in the water rights field.

A. The decision below conflicts in principle with this Court's decision in *First Iowa Hydro-Electric Coop.* v. *FPC,* 328 U.S. 152 (1946), the leading case delineating the respective areas of Federal and State jurisdiction under Section 27 of the Federal Power Act.[12] There, in holding that the Federal Power Commission on issuing a license is vested with exclusive jurisdiction and may supersede conflicting State laws dealing with power uses of streams subject to the Act,[13] this Court expressly stated that the control of irrigation and municipal uses and vested rights thereunder was left by Section 27 of the Act to the exclusive jurisdiction of the States:

> . . . Section 27 expressly "saves" certain state laws relating to property rights as to the use of water so that these are not superseded by the terms of the Federal Power Act. . . .
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> Section 27 thus evidences the recognition by Congress of the need for an express "saving"

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[12] Section 27 provides as follows:

"That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." (41 Stat. 1077 (1920), 16 U.S.C. § 821 (1958)).

[13] Section 9(b), construed in *First Iowa* as completely distinct from Section 27, calls for the submission to the Commission by an applicant only of evidence of his rights to "use of water for *power* purposes" under State law. Likewise, Section 4(e) authorizes the Commission to issue licenses "for the development, transmission, and utilization of *power* . . . upon any part of the public lands and reservations of the United States . . . ." 16 U.S.C. § 797(e); Section 23 prohibits construction of facilities "for the purpose of developing electric *power,*" unless licensed. 16 U.S.C. § 817. (Emphasis added throughout.)

> clause in the Federal Power Act if the usual rules of supersedure are to be overcome.
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> The effect of § 27, in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. (328 U.S. at 175-76.)

Thus, this Court viewed the Act as affecting the "integration" of Federal and State jurisdiction with each supreme in its own sphere rather than "a dual system of futile duplication of two authorities over the same subject matter" (*Id.* at 171):

> In the Federal Power Act there is a separation of those subjects which remain under the jurisdiction of the states from those which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two co-operating agencies of Government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue. . . . *Id.* at 167-68.[14]

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[14] FPC has consistently, up to this case, followed this construction of *First Iowa* and refused to do anything in issuing a license that would interfere with vested irrigation and municipal use rights of the licensee or others and has deferred any controversies respecting such conflicting rights to the States. See e.g. *Southern California Edison Co.*, 8 F.P.C. 364, 384-85 (1949); *East Bay Municipal Utility District*, 1 F.P.C. 12, 13 (1932). While FPC made no express ruling here, the decision of the court below is the first instance to rule the Commission has jurisdiction of such disputes. The Commission in inserting fish conditions in licenses has never done so before this case where it would conflict with consumptive uses of water.

In addition to other rights of the Districts dating back to 1855, upon application by them in 1951, the State in 1953 issued a permit expressly authorizing their proposed irrigation uses from New Don Pedro, without any fish conditions. This action was not opposed in any way by the fish interests, although Fish and Game had actual notice of the Districts' application (JA 87) and full opportunity to protest it.[15] The permit, having never been contested, is a final adjudication according the Districts a priority as against any conflicting use[16] and is not subject to collateral attack.[17] The holding of the court below, finding jurisdiction in the Commission to supersede the State adjudication, results in the very duplication of regulatory control precluded by the *First Iowa* decision.

B. The Court of Appeals, in holding that the Federal Power Commission on issuing a license is empowered by Section 10(a) of the Act to impair the vested irrigation and municipal use rights of a license applicant or others,[18] has erroneously decided an important question of the Commission's authority which

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[15] Although the State Engineer, as Chief of the Division of Water Resources, was then performing the functions now under the State Water Rights Board, the procedure for obtaining permits provided then, as it does now, for public notice, protests by persons interested, hearing and judicial review. See Calif. Water Code §§ 1300, 1330, 1340, 1350, 1360 (1963).

[16] Under the Water Code the State Engineer was required to determine the relative rights between the irrigation and municipal uses sought and all other possible uses, such as fish. See Calif. Water Code § 15 (1943) (now contained in §§ 1253-55); 18 Ops. Atty. Gen. Calif. 31, 37-38 (1951).

[17] See Calif. Water Code § 1225, 1381, 1455, 1410 (1963).

[18] While the court held that San Francisco was properly not a licensee, it upheld Commission jurisdiction, at the end of the twenty-year period set forth by Article 37, to curtail San Francisco's municipal uses, as well as the Districts' irrigation uses. See App. pp. 11a-12a.

has not been, but should be, decided by this Court. This is believed to be the first such decision since enactment of the Federal Water Power Act in 1920.

The legislative history of the Act, not cited in the opinion below, affords conclusive evidence that Congress did not intend to give the Commission any authority under Section 10(a) over consumptive use water rights. The bill reported by the House Special Committee on Water Power in 1917 (S. 1419) contained language in Section 10(a) that expressly authorized the Commission to consider irrigation in the concept of comprehensive development. This language was deleted on the floor because, as the proponents of the amendment put it:

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> Mr. Taylor of Colorado. Mr. Chairman, my object in moving to strike out this word "irrigation" is this: This is a water-power bill. The purpose of this legislation is to regulate the water power of the entire United States, both upon the navigable and nonnavigable streams. It is purely a water-power measure and we have no right in this bill to include and interfere with other subjects that are not necessarily involved in water-power control. . . . Everyone who knows anything about western development or about irrigation or the waters of the streams of the Western States knows that the Congress of the United States in 1866 and 1872 expressly gave the waters of the streams throughout the arid West to the people of those States in order that they might use them for the irrigation and reclamation of the arid land of those regions. The waters were given absolutely, to be diverted from the streams under a right of appropriation for irrigation, domestic, mining, and other beneficial purposes.
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> Mr. Mondell. . . . Now, we have had enough experience in the West to know the necessity of

> guarding jealously perpetual rights under irrigation, because we know how essential it is, and therefore we all of us realize the danger that lies in even seeming to give a commission, whose business it is to grant only 50-year franchises, any control over the diversion of water for irrigation purposes.
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> . . . It is all right to leave in the bill the term "other beneficial uses," because that indicates to the commission that they shall serve the general situation, but to leave any impression with them that we are proposing to give them any jurisdiction of the diversion of waters for irrigation would be fatal to irrigation development.[19]
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> * * * * *

Subsequently, when Section 10(a) had been reported by the 66th Congress in the form in which it was finally enacted, another attempt to reinsert the term "irrigation" by way of a floor amendment was rejected by the House, because, in the words of Congressman Taylor:

> . . . The House debated this identical amendment fully when this bill was before the House during the last session and rejected it. I want to say on behalf of 999 people out of every 1,000 throughout the entire arid States of the West, that we emphatically do not want our water rights, our States right, our priority irrigation rights, which are the birthright of our country, placed under a Federal licensing commission. The waters in our nonnavigable streams of the arid West belong to the people of our States, and we do not want anything put in this bill, or any other bill, that will give any Federal bureau here in Washington, 2,000 or 3,000 miles away, or any Federal commission a semblance of authority to supervise or

[19] 56 Cong. Rec. 9901-03 (1918).

> supersede or tax or license or in any way regulate or control our irrigation water rights, or assume any supervisory jurisdiction over our irrigation or domestic water rights. . . .[20]

The decision of the Court of Appeals in this case approves a usurpation of precisely the type of authority which Congress so painstakingly labored to insure that the Commission could not exercise.

C. The court below has in effect decided that the Federal Power Act supersedes the Desert Land Act's grant of jurisdiction to the States to control irrigation uses from nonnavigable waters on the public lands, an important issue left open by this Court in its *Pelton Dam* decision.[21]

Section 1 of the Desert Land Act (App. pp. 24a-25a) has long been construed by this Court as effecting a severance of nonnavigable waters on the public domain from the control of the Federal Government:

> What we hold is that following the Act of 1877, if not before, all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states. . . .[22]

The facts that the Tuolumne is a non-navigable stream and that only public lands of the United States will be affected by the project have been accepted without contradiction (App. pp. 1a, 4a). It is also undisputed that under the California Water Code, it has been finally determined that the Districts have

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[20] 58 Cong. Rec. 2135 (1919).

[21] *FPC* v. *Oregon*, 349 U.S. 435 (1955).

[22] *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935). See also *FPC* v. *Oregon*, 349 U.S. 435, 448 (1955).

prior rights to the use of these waters without any fish release conditions. The court below in holding that the Federal Power Commission on issuing a license is not bound by this adjudication under the State Water Code, but can reallocate the Districts' consumptive use right to fish, has clearly negated the Desert Land Act as previously construed by this Court. In so doing, the court has decided without so saying the very issue expressly left unresolved in this Court's *Pelton Dam* case (349 U.S. at 448). Furthermore, the court below ignored this Court's recognition in *Pelton* that in issuing a license the Commission cannot interfere with vested water rights (*Id.* at 445).

D. The decision below by authorizing the Federal Power Commission to duplicate and supersede state determinations of irrigation and municipal rights to the use of nonnavigable waters has a wide impact on water rights throughout the country. It unsettles all water rights adjudicated under State law, either by the permit system,[23] or by direct appropriation.[24] No

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[23] Wash. Rev. Code Ann. § 90.03.250; Ore. Rev. Stats. § 537.130; Cal. Water Code § 1225; Idaho Code 1947, § 42-202; Nev. Rev. Stats., § 533.325; Ariz. Rev. Stats., § 45-142; N. M. Stats. 1953, § 75-5-1; Utah Code Ann. 1953, § 73-3-1; Wyo. Stats. 1957, § 41-201; Vernon's Texas Civil Stats. Ann., Art. 7492; Okla. Stats. Ann. Tit. 82, § 21; N.D. Century Code, § 61-04-02; S.D. Code, § 61.0110 (1960 Supp.); Neb. Rev. Stats. 19, § 46-233; Kan. Stats. Ann., § 82a-709 (1964 Supp.); Md. Code Ann., Art. 66c, § 720; Minn. Stats. Ann., § 105.41; Miss. Code 1942, § 5956-04 (1964 Supp.); Iowa Code Ann., § 455 A. 26; Fla. Stats. Ann., § 373.141. Other lesser state regulations are discussed in Water Resources and the Law 91-113 (Leg. Research Center, Univ. of Mich. Law School, 1958).

[24] As in Colorado and Montana: see *Archuleta* v. *Boulder & W. C. D. Co.*, 118 Colo. 43, 192 P. 2d 891 (1948); *Clausen* v. *Armington*, 123 Mont. 1, 212 P. 2d 440 (1949).

matter how long standing such rights might be under state laws they all are subject to reallocation to other users if at any time any part of the irrigation or municipal system requires a federal license.[25]

The problem is further aggravated by the court's decision that the Federal Power Commission need not, despite the requirement of Section 6 that all "terms and conditions be expressed in [the] license,"[26] advise the applicant the extent to which his vested water rights may be reallocated to others in the future, but retains continuing jurisdiction to make any such further reallocation of those waters as it deems proper.[27]

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[25] The court below held that the Commission in licensing New Don Pedro may reallocate the Districts irrigation diversions 5 miles downstream below the project boundaries at La Grange dam, the Districts' irrigation diversion structure constructed in 1894. Similarly, the court held that the Commission in the future can reallocate San Francisco's municipal use diversions, made many miles upstream above the New Don Pedro project boundaries at Early Intake, completed in 1925.

[26] For Section 6 see App. pp. 26a-27a.

[27] Article 37 of the proferred license provides for the imposition of additional releases after twenty years of project operation virtually without limitation. Article 37 provides in pertinent part:

> After the first 20 years of project operation, the Licensees shall maintain minimum stream flows in the Tuolumne River at La Grange bridge as may be prescribed hereafter by the Federal Power Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the California Department of Fish and Game, after notice and opportunity for hearing and upon a finding based on substantial evidence that such minimum flows are available and are necessary and desirable and consistent with the provisions of the Act (JA 682).

Although the Court of Appeals construed the condition as not authorizing impairment of economic feasibility (App. p. 12a), the Districts have no assurance that after 20 years the Commission will not make New Don Pedro less beneficial for irrigation purposes than their present project.

Thus the licensee is required to give the Commission a blank check to impair his vested consumptive use rights.

Furthermore, the Court of Appeals decision results in unfairly discriminating against license applicants which are public agencies having vested irrigation and municipal water rights. Such agencies would be required to surrender those rights without compensation as a condition to receiving a license, while license applicants possessing no such rights could not be similarly burdened. Since most of the irrigation and municipal use water rights throughout the West are held by public agencies and relatively few by private power companies, these public agencies are placed at a decided disadvantage as license applicants. Thus, the practical effect of the decision below would be to circumvent the preference for public applicants contained in Section 7(a) of the Act.[28]

II. The holding of the Court of Appeals that the Federal Power Commission in licensing New Don Pedro is not bound by the Congressional confirmation in the Raker Act of 1913 of the Districts' rights to the

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[28] 16 U.S.C. § 800(a): "In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 808 of this title the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region . . . ."

use of Tuolumne River water is clearly contrary to Section 29 of the Federal Power Act and poses an important issue for decision by this Court.

The Raker Act of 1913 resulted from a long and careful consideration by Congress of all existing and prospective uses of water from the Tuolumne River. In granting San Francisco the rights-of-way necessary to develop the upper Tuolumne for a municipal water supply, Congress conditioned these uses in Sections 9(b) and (c) upon recognition of certain express irrigation rights of the Districts:

> "Sec. 9. That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:
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> * * * * *
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> (b) That the said grantee shall recognize the prior rights of the Modesto Irrigation District and the Turlock Irrigation District as now constituted under the laws of the State of California, or as said districts may be hereafter enlarged to contain in the aggregate not to exceed three hundred thousand acres of land, to receive two thousand three hundred and fifty second-feet of the natural daily flow of the Tuolumne River, measured at the La Grange Dam, whenever the same can be beneficially used by said irrigation districts, and that the grantee shall never interfere with said rights."[29]

In the words of Congressman Raker, these provisions of the Act constituted "a solemn guaranty that [the

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[29] See App. p. 36a for Section 9(c).

Districts] will always have enough water for their 300,000 acres of land." 50 Cong. Rec. 3904 (1913).[30]

The court below, however, held that the express Raker Act allocations of Tuolumne River waters to the Districts can be impaired by the Federal Power Commission and can only be preserved through the abandonment by the Districts of their project. This ruling is in direct conflict with the clear language of Section 29 of the Federal Power Act precluding Commission impairment of any of the provisions of the Raker Act:

> Section 29 . . . That nothing herein contained shall be held or construed to modify or repeal any of the provisions of the Act of Congress approved December 19, 1913, granting certain rights-of-way to the city and county of San Francisco in the State of California, . . . 41 Stat. 1077, 16 U.S.C. § 823.

The Districts and San Francisco have relied upon the guarantees of the Raker Act in all of their respective developments upon the river for the fifty years since 1913, including proposed New Don Pedro. The court's negation of the Raker Act's statutory formula

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[30] The extensive legislative history of the Act makes it absolutely clear that these conditions were part of a total allocation of the Tuolumne's waters between San Francisco and the Districts. The plan submitted to Congress by San Francisco and approved in the Raker Act called for a development by the City, under existing water rights, of a system capable of delivering 400 mgd of municipal water. See report by John Freeman, Hetch Hetchy Water Supply for San Francisco, 21-23, 77, 78 (1912); H.R. Doc. 54, 63d Cong. 1st Sess. 14-15, 71 (1913); Hearings before the House Committee on Public Lands on H.R. 6281, 63d Cong. 1st Sess. 52, 90 199, 261 (1913). This plan contemplated the ultimate full use of the river's water by the City except for that guaranteed the Districts in recognition of their existing rights. See Freeman, supra at 21-22, 77; H. Doc. 54 supra at 50; H. Rep. 41, supra at 23, 38-39; 50 Cong. Rec. 5472 (1913); see also 50 Cong. Rec. 3996, 4106-07, 5491 (1913).

for the allocation of Tuolumne River system waters, cannot be reconciled with this Court's decision in *Arizona* v. *California* where a similar allocation of Colorado River waters by Sections 4(a) and 5 of the Boulder Canyon Project Act was held binding on all parties including the Federal Government.[31]

III. The case presents an important question under the Fifth Amendment of the Constitution. The decision below would in effect permit the Federal Power Commission to exercise powers akin to those under Congress' exercise of the navigation servitude,[32] but on nonnavigable streams, to take without limit vested irrigation and municipal use rights and reallocate them to others without compensation. Even under the navigation servitude doctrine, this Court has refused to go this far:

> * * * Similarly, we need not ponder whether, by virtue of a highly fictional navigation purpose, the Government could destroy the flow of a navigable stream and carry away its waters for sale to private interests without compensation to those deprived of them. We have never held that or anything like it, and we need not here pass on any question of constitutional power; for we do not find that Congress has attempted to take or authorize the taking, without compensation, of any rights valid under State law. * * *[33]

Up to this time it is indisputable that when the Federal Government itself acts under the property clause on nonnavigable streams, just compensation must be paid for any water rights taken. See *Dugan* v. *Rank*, 372 U.S. 609, 625-26 (1963); *Ivanhoe Irr. Dist.* v. *Mc-*

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[31] 373 U.S. 546, 575-85 (1963).

[32] *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1955).

[33] *United Stataes* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 737 (1950).

Cracken, 357 U.S. 275, 290-91 (1951); *United States* v. *Gerlach Live Stock Co.,* 339 U.S. 725, 739 (1950). Thus, if the Federal Government were to construct the New Don Pedro project and operate it under provisions requiring Article 37 water releases for fish, the Districts and San Francisco would be entitled to just compensation for the taking of their water rights. The holding below authorizing the Federal Power Commission to exercise such unlimited powers through license conditions, goes beyond, we believe, the limitations on governmental action imposed by the Fifth Amendment of the Constitution.[34]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 20, 1965

[34] *Frost* v. *Railroad Commission,* 271 U.S. 583, 593-594 (1926). See *FPC* v. *Niagara Mohawk Power Co.,* 347 U.S. 239, 251-53 (1954); see also *West* v. *Chesapeake P. Teleph. Co.,* 295 U.S. 662, 671 (1935)).

APPENDIX A

(345 F. 2d 917)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19,394

STATE OF CALIFORNIA; TURLOCK IRRIGATION DISTRICT, CALIFORNIA, and MODESTO IRRIGATION DISTRICT, CALIFORNIA, UNITED STATES OF AMERICA on the relation of Stewart L. Udall, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

[May 18, 1965]

On Petition to Review an Order of the Federal Power Commission

Before: CHAMBERS, HAMLEY and BROWNING, Circuit Judges

HAMLEY, Circuit Judge:

This is a proceeding to review two Federal Power Commission orders granting a license for the multipurpose New Don Pedro project on the Tuolumne River in California. The petitioners are the Turlock and Modesto Irrigation Districts, the Secretary of the Interior (Secretary), and the State of California (state). The districts, which had jointly applied for the license, complain of terms and conditions attached to the license imposed for the protection of salmon runs. The Secretary and the state, on the other hand, assert that those terms and conditions are not sufficiently far-reaching.

The nonnavigable Tuolumne River rises in the Sierra Nevadas above the Hetch Hetchy Valley. By the time it reaches the San Joaquin Valley floor at La Grange, the river drains an area of about 1540 square miles. From

La Grange it runs for some fifty miles to its confluence with the San Joaquin River, with the Turlock district on one side and the Modesto district on the other. The river has extreme variations in annual flow, ranging from 3,204,300 acre feet in 1938 to 600,300 in 1924. A high flow is usual in March to June, followed by very little run-off.

The two districts were formed in 1887. At that time they had a combined acreage of 257,000 acres, roughly two thirds in the Turlock district and one third in the Modesto. Rainfall in this area averages only twelve inches annually, ninety percent of which is in the winter months. The storage and diversion of surface water is therefore essential to successful agriculture. The Tuolumne is the only source of surface water available to the districts.

The districts initially purchased prior appropriative rights, dating back to 1855, to the use of Tuolumne River waters. They supplemented these rights by direct appropriations filed under California law in 1889 and 1890. The districts constructed the La Grange diversion dam in 1894, the off-stream Modesto Reservoir in 1911, and the off-stream Turlock Reservoir in 1914.

Early in the twentieth century, the City and County of San Francisco sought rights of way from the United States in Yosemite National Park so that it could establish storage in the headwaters of the Tuolumne, to support the diversion of water for domestic use in the San Francisco Bay area. The result was the enactment of the Raker Act, 38 Stat. 242 (1913).

In the Raker Act, Congress granted San Francisco the rights of way it needed. This grant, however, was made subject to the observance, by the grantee, of certain enumerated conditions. One of these is that the grantee shall recognize the specified prior right of the Turlock and Modesto irrigation districts. This was the right to receive

2,350 second feet of the natural flow of the Tuolumne measured at the La Grange Dam, ". . . whenever the same can be beneficially used. . . ." by the districts for the irrigation of three hundred thousand acres of land. Section 9, 38 Stats. at 246. During a sixty-day period beginning on April 15 of each year, San Francisco is, under this statute, required to recognize the right of the districts to the extent of four thousand second feet.

San Francisco initiated its activity in the upper Tuolumne watershed in the 1901 to 1911 period, posting notices of appropriations of water under California law and conducting surveys. The city intensified this activity following passage of the Raker Act, a system being planned to export ultimately four hundred million gallons a day (mgd) to the Bay area. In 1918, the city completed Lake Eleanor Reservoir, having a capacity of 27,100 acre feet. In 1923 it completed O'Shaughnessy Dam, impounding 206,000 acre feet in Hetch Hetchy Reservoir.

In the same year the districts constructed the original Don Pedro project, impounding about 290,000 acre feet at a site five miles upstream from La Grange Dam. O'Shaughnessy Dam was altered in 1935 to 1938 and 1949 to a capacity of 360,360 acre feet. In 1956 San Francisco completed Cherry Valley Dam, impounding 268,200 acre feet in Lake Lloyd.

In 1951, the districts made application to the state for water right permits covering storage and diversion for irrigation use necessary to the construction of the New Don Pedro project. The New Don Pedro Dam would be downstream of Don Pedro Dam, and would flood out the latter structure.

It would have a maximum height of 580 feet and would create a reservoir extending twenty-two miles up the Tuolumne having a gross storage capacity of 2,030,000 acre feet. Of this, 310,000 acre feet would be for a minimum

pool and 340,000 acre feet would be dedicated to flood control. In addition, 570,000 acre feet would be available as exchange storage in which San Francisco could store water to satisfy the Raker Act entitlements of the districts. This would make it possible for San Francisco to make the necessary diversions to its upstream aqueduct to maintain a dependable supply in its Bay area system. The remaining storage capacity would be utilized by the districts in serving their needs.

The project involves a power plant with a peaking capability of 150,000 kilowatts, such production to be subservient to the operation of the project for the other purposes described above. In addition to the purposes already mentioned, the districts contemplated a recreational development of the reservoir in coördination with interested federal, state and county agencies. It was also proposed that the project be operated so as to provide in the fall and winter months as much water as possible for salmon in the stream below the La Grange diversion dam.

The total cost of the project is estimated at $92,415,850. San Francisco has entered into an agreement with the districts to contribute to the cost of the project an amount to be based on the cost of constructing a dam and reservoir with a storage capacity of 1,200,000 acre feet, exclusive of cost of power facilities and lands. San Francisco's contribution is estimated at $43,181,790. The districts propose to finance their share of the cost, estimated at $49,334,060, by the sale of bonds.

Lands of the United States in the public domain would be used in the construction and operation of the project. Therefore the districts needed to obtain from the Federal Power Commission a license to construct and operate the project, notwithstanding the fact that the Tuolumne is not navigable. See section 4(e) of the Federal Power Act, 49 Stat. 839 (1935), 16 U.S.C. § 797(e) (1958); *F.P.C.* v. *Oregon,* 349 U.S. 435, 442-443.

The districts filed a joint application for such a license. A proceeding before the Commission was thereupon instituted, and the state immediately intervened in that proceeding. The Secretary and others sought to intervene at a later stage in the proceeding. The latter were granted limited intervention for the purpose of making an opening statement, cross examining witnesses, and filing briefs and exceptions.

After proceedings before an examiner, the latter issued an initial decision. The districts, state, Secretary and the Commission's staff filed exceptions. After oral argument, the Commission, on March 10, 1964, filed its Opinion No. 420 and order, issuing a fifty-year license to the districts subject to certain terms and conditions. The districts, state and Secretary applied for a rehearing. On May 6, 1964, the Commission entered an order modifying the earlier order, and denying the application for rehearing. This review proceeding was then commenced.

The questions presented here relate, for the most part, to the inclusion, among the terms and conditions of the New Don Pedro project license, of Article 37, pertaining to the release of waters to maintain fish runs below the New Don Pedro Dam. This article provides that, for the first twenty years of the project operation, the districts shall maintain minimum stream flows in the Tuolumne River at La Grange Bridge (river mile 50.5) for fish run purposes in accordance with a table set forth in the article.

The table lists the number of cubic feet per second (cfs) and the number of acre feet to be released during specified periods of each year, depending upon whether the immediately preceding year is a "normal" year (schedule A) or a "dry" year (schedule B). The total acre feet to be released in a year immediately following a "normal" year is 123,210 acre feet, and immediately following a "dry" year, 64,040 acre feet. A "normal" year is defined as any year ending on October 1 in which the inflow into New Don

Pedro Reservoir equals or exceeds one million acre feet. A "dry" year is defined, in like manner, as one in which such inflow is less than one million feet. Schedule B, applicable immediately after a "dry" year, is also made subject to the proviso quoted in the margin.[1]

Article 37 also contains the following provision stating what is to happen at the end of the twenty-year period:

> "After the first 20 years of project operation, the Licensees shall maintain minimum stream flows in the Tuolumne River at La Grange bridge as may be prescribed hereafter by the Federal Power Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the California Department of Fish and Game, after notice and opportunity for hearing and upon a finding based on substantial evidence that such minimum flows are available and are necessary and desirable and consistent with the provisions of the Act."

The districts contend that Article 37 impairs the irrigation uses of the districts covered by water rights acquired under California law, and that the Commission is without authority to impair those rights. Counsel for the Commission does not, on this review, take serious issue with the districts' contention that Article 37 could operate to impair full use of their irrigation water rights. Instead, counsel defends the Commission's authority, under the circumstances, to attach a condition to the New Don Pedro project which may have that result.

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[1] "*Provided,* that in a water year when the inflow is less than 750,000 acre feet, the amount of water provided under Schedule B shall be reduced by a percentage of the total acre feet equivalent to the percentage reduction in the gravity diversion at La Grange by the Licensees. For this purpose, the diversion shall be defined as 900,000 acre feet to Licensees."

In its opinion and order of March 10, 1964, the Commission declined to pass upon the legal question of the Commission's authority in this regard because, in its view, the fish releases required under Article 37 are not ". . . expected to interfere with such rights [the districts' water rights] during the first 20 years of operation, . . ." Elsewhere in that opinion and order, and in its order of May 6, 1964, the Commission seems to state, rather categorically, that the fish release requirements of Article 37 will not limit the districts' planned use of its irrigation water rights for at least twenty years.

But in other of its statements in these two orders the Commission discloses that its expectations in this regard might not be realized. The Commission indicates that its judgment in the matter is based in part upon the assumption that the past hydrologic cycle is a generally representative pattern for the future, and that it has taken into consideration the districts' "average irrigation yield." The Commission's last statement on the subject is that, in making fish releases for twenty years as specified in Article 37, the districts ". . . are giving up considerable value in terms of . . . the unrestricted use of the water for irrigation."

Still more significant is the Commission's statement, in its order of May 6, 1964, that the districts' present irrigation needs are about one million acre feet a year ". . . and these needs should continue at about 1,000,000 acre feet a year for the foreseeable future. . . ." Inasmuch as the proviso of Article 37 specifically provides for fish releases, although in reduced amounts, even when the gravity diversion at La Grange by the districts falls below nine hundred thousand acre feet, it would seem that Article 37 specifically contemplates fish releases which may take water the districts will need for irrigation.

The Commission indicates, in its order of May 6, 1964, that if circumstances develop calling for application of the

proviso to Article 37, and reduced releases therein called for are not sufficient to meet the districts' needs:

> "... the applicants would have to seek a modification of the license requirements to meet the emergency. We do not expect this situation to arise, but if it should we would consider such modification of the license to the extent shown to be necessary in the public interest."

The Commission thus indicates that it is aware of the great importance to the districts of having water sufficient to meet their irrigation needs, no matter how this may affect the fish release program. But the agency also makes it clear that should such an unanticipated conflict of interest arise, it would deal with the question in the context of the public interest. Presumably this could lead to a result different than would be called for by a strict recognition of the districts' irrigation water rights unless, when it came to deal with the problem, the Commission should conclude, as a matter of law, that the districts' rights must prevail.

So analyzing the potentials inherent in Article 37 and the Commission's announced way of administering it, we are convinced that a determination of the legal question as to the Commission's authority should have been made by the Commission and must, in any event, be made on this review. As before indicated, both the districts and counsel for the Commission have argued the question on the merits and make no contention that the proceeding should be remanded to the Commission for an initial adjudication on the point.

The districts' present exercise of their irrigation water rights through utilization of existing facilities is not actually or potentially impaired by the Commission order. But the districts propose to augment their exercise of those rights by the construction and operation of facilities which will include a power project and which will be located, in

part, upon the public lands of the United States. It is this circumstance which required the districts to apply to the Commission for a license.

In granting such a license the Commission is required, under section 10(a) of the Federal Power Act, 49 Stat. 842 (1935), as amended 16 U.S.C. § 803(a) (1962), to consider all beneficial public uses including recreational uses. Under that section, and under section 4(g) of the Act, 16 U.S.C. § 797(g) (1958), the Commission is made the "guardian of the public domain." *F.P.C.* v. *Idaho Power Co.*, 344 U.S. 17, 23. The issuance of a license can be justified only on the theory of a resulting benefit to the public. *Alabama Power Co.* v. *F.P.C.*, D.C. Cir., 128 F.2d 280, 288-289.

The districts rely upon section 27 of the Federal Power Act, 41 Stat. 1077 (1920), 16 U.S.C. § 821 (1958), as precluding the Commission from attaching conditions to the license which may impair use of their irrigation water rights, even though such conditions may be appropriate under section 10(a) of that Act.[2] In *Portland General Electric Co.* v. *F.P.C.*, 9 Cir., 328 F.2d 165, 176-177, we held that section 27 did not stand in the way of the Commission in imposing navigation conditions in a license pursuant to section 11 of the Federal Power Act, 41 Stat. 1070 (1920), 16 U.S.C. § 804 (1958).

In our opinion the same principle governs where conditions in a license are imposed pursuant to section 10(a).

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[2] Section 27 reads:

"§ *821. State laws and water rights unaffected*

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

It is true that in the *Portland* case the basis of Commission authority is the navigability of the water in question, while here the basis of Commission authority is the fact that public lands will be affected. This might make a difference if the issue presented were whether the consent of California was required with regard to the provisions made for the conservation of anadromous fish. See *F.P.C.* v. *Oregon,* 349 U.S. 435. But California makes no such contention here and the districts are as opposed to state restrictions as they are to federal restrictions.

The districts also argue that section 29 of the Federal Power Act, 41 Stat. 1077 (1920), 16 U.S.C. § 823 (1958), providing that nothing contained in that act shall be held or construed to modify or repeal any of the provisions of the Raker Act, precludes the Commission from imposing a license condition which may impair their irrigation water rights.

The districts, however, will continue to receive the flows guaranteed to them under the Raker Act as long as they are content with their present facilities. That act did not give them the right to use the public lands they now wish to utilize in connection with the New Don Pedro project. With regard to those public lands, the districts are in the same position as any other applicant for a license—if they are to use those lands they must accept the reasonable restrictions and obligations attached thereto.

We therefore conclude that the Commission had authority to incorporate in the tendered license a condition which could operate to impair the districts' full use of their irrigation water rights in some future year. The likelihood that circumstances will occur during the next twenty years which will, in fact, present such a problem seem remote. The prospect that, if such circumstances do arise, the Commission will solve the problem in a manner which will deprive the districts of essential irrigation requirements is

speculative. Should such an eventuality come to pass, any such Commission action will be subject to review as to the sufficiency of the evidence to support findings upon which such action is based, and as to whether the action is arbitrary and capricious. But we now hold that the Commission has the legal authority to take appropriate action restricting the use of such irrigation rights, should the occasion arise.

The districts argue that the Commission violated section 6 of the Federal Power Act, 49 Stat. 841 (1935), 16 U.S.C. § 799 (1958), by ordering the issuance of a license which did not state all of its terms and conditions. Section 6 provides, in relevant part, that licenses issued under the Act shall be issued for a period not exceeding fifty years and upon terms and conditions ". . . expressed in said license." The section further provides that a license may be altered or surrendered only upon mutual agreement between the licensee and the Commission.

The asserted violation of section 6 is brought about by the provision of Article 37 which requires that, after the first twenty years of operation, the districts shall maintain such minimum stream flow at La Grange Bridge as may be then prescribed by the Commission after further proceedings to be held at that time.

The districts indicate that certainty sufficient to overcome this section 6 objection will be achieved only if the license guarantees them a specific dependable power capacity in kilowatts for the entire fifty-year license period, indicating that this should be not less than 73,000.

In its second opinion and order the Commission made the statement set out in the margin concerning the purpose and scope of any modification of the initial release requirement which might be made at the end of the twenty-year

period.[3] In our view Article 37, read in the light of the quoted statement, definitely establishes that whatever curtailment in irrigation and municipal purposes may be found legally and factually supportable at the end of the twenty-year period, no fish release will be required after that date which will impair the continuing economic feasibility of the project.

The section 6 requirement that the terms and conditions of a license be expressed in the license must not be given a construction which is impracticable of application. When the Commission reasonably foresees the possibility that a need may develop years in the future requiring, in the public interest, the imposition of a burden upon the licensee at that time, but either the dimensions of the need or the way of meeting it is not presently ascertainable, the license terms cannot possibly speak with definiteness and precision concerning the matter. Under these circumstances, it is sufficient, under section 6, to include in the license a condition reserving the problem, including the licensees' rights to test the validity of any future action taken.

The principle applicable here is analogous to that which obtains in determining whether the Commission order must contain specific findings of fact as to future conditions. We dealt with that problem in *Portland General Electric Co.* v. *F.P.C.*, 9 Cir., 328 F.2d 165, 175. We there held that it is not arbitrary, unreasonable, or a deprivation of due process to refrain from making findings as to what conditions may

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[3] "Opinion No. 420 clearly states that the releases which the applicants are now required to make will be subject to modification at the end of the 20-year period to assure the continuing feasibility of the New Don Pedro project; there is no assurance, however, that the applicants and San Francisco will thereafter be free to use the waters of river for irrigation and municipal purposes without limit. For the reasons spelled out in Opinion No. 420, the allocation of river waters which will best serve the public interest within the limits permissible under law appropriately should and will be made when and if the need for such allocation arises."

be in the future, at least where no present burden is imposed.

In its opinion of March 10, 1964, the Commission indicated that it could not now evaluate with assurance a number of factors which should be considered in determining the kind of fish release program which will be needed during the last thirty years of the license period.[4] We find no basis in the record before us for holding that the Commission has overstated these present uncertainties.

In light of these circumstances the provision of Article 37, giving notice of the prospective reëxamination of the fish release problem at that time and outlining procedures to be followed in the interim looking to the development of a proper solution, provide as much precision and definiteness in this regard as is presently practicable. We therefore hold that there has been no violation of section 6 of the Federal Power Act in the respect asserted.

The districts contend that the specification of releases was totally unnecessary in the face of the Commission's own expectations, as stated in its opinion of March 10, 1964, quoted in the margin.[5]

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[4] The factors mentioned are: vagaries of the weather, possible alternative sources of water for the purpose of preserving fish runs, development of other techniques such as fish hatcheries for preserving fish runs, possible destruction of the Tuolumne fishery by changes in flow downstream from La Grange by causes beyond the control of the districts, possible reduction in the districts' irrigation requirements due to increased urbanization and industrialization or by the development of more efficient methods of utilizing water, and the possibility of reduced interest rates on the districts' bonded indebtedness.

[5] ". . . we do not seriously question the applicants' contention that even without such a condition the salmon runs would be preserved longer with New Don Pedro than with existing Don Pedro. On the basis of the record, we would expect that New Don Pedro could be operated without adverse effect on the salmon runs until after 1985, when San Francisco's upstream diversions reach 295 mgd; whereas without New Don Pedro it appears that the fish would be seriously affected, if not destroyed, after 1968, when San Francisco's diversions reach 210 mgd."

We do not read the quoted statement as meaning that, even without prescribed releases the fish will be assured of sufficient water until 1985. The Commission was discussing the adequacy of water, not the need of imposing release requirements to assure that the available water would be released for fish runs. This is made clear by the Commission's further statement which immediately follows that quoted in note 5.[6]

The districts argue that the Commission's findings of fact are inadequate for purposes of court review. They urge that the Commission did not say how the releases in the amounts prescribed could be justified, ". . . it simply summarized in one paragraph the California contentions about salmon requirements (R. 3896) and then stated that its analysis of the record showed California's studies to be 'reasonable.' " Even then, the districts state, the Commission qualified this by adopting the staff's "inflow" rather than California's "natural flow" formula, in language that recognized that California's claims for salmon were overstated. The Commission makes no response in its brief to this argument about the clarity of the findings.

The rule the districts here invoke is that there must be clarity and completeness in the basic or essential findings on which administrative orders rest. *Colorado-Wyoming Gas Co.* v. *F.P.C.*, 324 U.S. 626, 634. Or, as the District of Columbia Court of Appeals recently said in *Government of Guam* v. *Federal Maritime Commission*, 329 F.2d 251,

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[6] "This evidence, however, does not substantiate the applicants' contention that no fish water releases should be required in the New Don Pedro license. In our judgment such releases are required as hereinafter prescribed if the projects [sic] is to be found to be best adapted to a comprehensive plan for development of the waterway, since only by making the releases a condition of the license can we be sure that the project will be operated so as to utilize the available water in the best interest of all parties and provide the best plan for comprehensive development for all public uses."

255, ". . . the reviewing authority is entitled to know—indeed must know—the basic data and the whys and wherefores of the Commissions conclusions."[7]

The findings of the Commission made in support of its fish releases, as stated in its opinion of March 10, 1964, are entirely sufficient with regard to: (1) the average run of salmon which ought to be protected, (2) the number of spawning salmon which must be provided for each year to protect the average run, (3) the number of square feet of spawning gravel required for each spawning salmon, and therefore the total amount of square footage required.

With regard to the amount of river flow necessary to support spawning called for under these three factors, the table of releases set out in Article 37 represents an adequate and express finding. Nowhere in the report does the Commission state the facts as to how this required river-flow figure was computed. The opinion does, however, indicate that the Commission accepted California's computations as to this. The only element of the latter computation which the districts appear to question is the low-flow figure for the test period during a survey conducted by the California Department of Fish and Game and the United States Department of the Interior. This low-flow figure is ascertainable from exhibits and testimony referred to in the briefs.

We therefore hold that the Commission findings are adequate for our purposes in reviewing the agency orders. This being true, the adequacy of the findings in other respects is immaterial, especially in view of the fact that, in their petition for rehearing filed with the Commission, the districts did not complain as to the adequacy of the findings. See section 313(b), Federal Power Act, 49 Stat. 860 (1935) as amended, 16 U.S.C. § 825 1(b); *Utah Power & Light Co.* v. *F.P.C.*, 10 Cir., 339 F.2d 436, 438.

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[7] See also, section 8(b) of the Administrative Procedure Act, 60 Stat. 242 (1946), 5 U.S.C. § 1007(b).

The districts contend that with regard to the annual amount of water releases necessary to accommodate eighty thousand salmon within the area found to be required, the findings of the Commission are not supported by substantial evidence.

This is true, the districts assert, because there inheres in California's proposed water release schedule, accepted in substance by the Commission, two assumptions of fact which are contrary to the evidence. One of these is the assumption that, during the test period referred to above, the low flow was 160 cubic feet per second, whereas it was actually 130 cubic feet per second. The other is the apparent assumption that there were no substantial accretions to the river which maintain a live stream regardless of releases at La Grange, whereas the fact is to the contrary.

With regard to the first of these points the evidence is sufficiently in dispute so that we are unable to say that the Commission erred in accepting the larger figure. Moreover, the Commission recognized that California's studies were "conservative" in some respects, and allowed for this by modifying, in the direction of reduced releases, the use to be made of the "normal year" and "dry year" schedules.

Concerning the failure of California to take accretions into account, there is reason to believe that this could not have been an important factor during the October to March period when spawning occurs. Accretions are for the most part the result of application of irrigation water to the lands on both sides of the stream bed and there is little irrigation in progress during the spawning season. The Commission indicated that it was aware that accretions had not been taken into consideration and allowed for it by ordering the modification referred to above.

Having in view the highly technical nature of the fact determinations in question and the judgment factors which were involved, both calling for expertise which the Com-

mission has, and this court does not, we conclude that the findings referred to above are supported by substantial evidence sufficient to withstand attack on this review.

Finally, the districts contend that the evidence does not support the Commissions finding that enough water should be released during the twenty-year period to accommodate eighty thousand salmon.

The Commission based this determination on its findings that the fish run which ought to be protected averages forty thousand salmon a year, and that to maintain this average the spawning grounds must be large enough to provide for up to eighty thousand adult fish each year, of which forty percent will be female. The districts' challenge runs to both of these findings.

The determination of the average run to be protected was based upon the best information available as to actual runs for past years. That information is adequate to support a protectible average run of forty thousand if the run of 130,000 in 1944 and the run of 120,000 in 1940 are included. A protectible average run of about twenty-five thousand fish would be indicated if the years prior to 1950 were excluded. The run was only five hundred in 1961, two hundred fifty in 1962 and one hundred in 1963.

In deciding how many past years should be taken into consideration in determining the protectible average, the Commission was required to make judgment determinations not subject to challenge here unless plainly arbitrary. We find no basis for holding that the Commission was arbitrary in providing for the protection of spawning on a scale which would reverse the downward trend in recent years.

On the other hand if, after a period of five years or so, under the Article 37 release schedule, the actual fish run has dwindled to but a fraction of the forty thousand hypothetical average, the districts ought to have the opportunity to seek a reopening of the fish release terms and

conditions. We do not construe the Commission orders as foreclosing this opportunity. As of the present time, however, we conclude that the finding in question is supported by substantial evidence.

The finding that, in order to protect an average spawning run of forty thousand, the spawning grounds must be large enough to provide for up to eighty thousand adult fish, is also supported by substantial evidence.

We turn now to the questions raised on this review by both California and the Secretary although, to some extent, these have already been discussed in dealing with the issues presented by the districts.

The first of these is whether the Commission erred in limiting the release schedule set out in Article 37 to the first twenty years of the fifty-year license period.

At the outset of this argument the Secretary and California call attention to various federal and state statutes manifesting legislative concern with the preservation of fish and wildlife resources.[8] The Secretary also asks us to bear in mind the magnitude of the fishery values involved.[9]

These petitioners argue that if the fish resources of the Tuolumne are to be saved, it must be done now by fixing adequate terms and conditions for that purpose which will be effective throughout the fifty-year license period. This

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[8] The Secretary and the state cite the following statutes: Fish and Widlife Act of 1956, 70 Stat. 1119-1124, as amended, 16 U.S.C. §§ 742a-742j (1958); Fish and Wildlife Coördination Act, 48 Stat. 401-402 (1934), as amended, 16 U.S.C. §§ 661-666c (1958); California Water Code § 1257; California Fish and Game Code § 1505.

[9] Experts testified that, during the period from 1953 to 1959, the Tuolumne River produced annually approximately 463,000 pounds of commercial salmon in California. On the average there are 2,600 commercial salmon fishermen, 1,330 salmon fishing boats, and thirty processing plants for salmon in California.

is, they assert, the normal procedure, applicants being required ordinarily to demonstrate at the time of the application proceedings that the project will be economically feasible for the entire license period having in view all expenditures necessary to preserve fish resources.

Petitioners cite numerous examples in which investor-owned utilities have been required to make substantial sacrifices, determined in advance, to finance fish facilities, hatcheries and fish ladders. The implication is that the irrigation districts and the City and County of San Francisco ought to receive similar treatment. If this determination is to be postponed for twenty years, they urge, there will then be in existence a new and overpowering circumstance, namely, the physical presence of the multimillion dollar New Don Pedro Dam and appurtenant works, which will prejudice freedom of action in providing for the preservation of fish runs.

All of these and other considerations of like nature were urged upon the Commission. But that agency had to consider the whole picture. While these petitioners say that construction of the new project will present the Commission with a *fait accompli* which will limit freedom of action at the end of the twenty-year period, the fact is that the Commission is already faced with a *fait accompli.* The districts and San Francisco are now free to operate the presently-existing river structures in a manner which will not protect fall fish runs. The prospect is that if the new project is not constucted, the entire Tuolumne fish run will be destroyed in the near future.

If this danger is to be averted, the Commission had to devise terms and conditions of a kind which the districts and San Francisco, balancing all of their present rights and future needs, could reasonably be expected to assume. They cannot be required to accept a license and they are not likely to if, in their considered judgment, the terms and conditions attached thereto threaten the economic feasi-

bility of the project or substantially impair water rights assiduously acquired and developed through the years.

The districts introduced credible evidence tending to show that, whatever the situation is now, in twenty years when San Francisco increases its diversion for municipal purposes to 295 mgd, there will not be sufficient water for the districts' irrigation needs if they are required to continue releases on the scale called for in Article 37. This alone was sufficient to justify the Commission in limiting the releases to that period, subject to review in the manner indicated in Article 37.

If, because of insufficient Tuolumne water, further Tuolumne releases should not be ordered after that date, alternatives such as a fish hatchery system may prove feasible, depending on need and economic feasibility. In our view the present form of Article 37 is adequate to enable the Commission to deal with the problem as it then exists and to impose such burdens on those who are in fact and law subject thereto, as the then-indicated solution requires.

Only the districts are licenses and any order the Commission may enter twenty years from now pursuant to Article 37 will therefore necessarily be directed only to them. This does not mean, however, that the districts, as licensees, may be immune from burdens justified because of the value of the New Don Pedro project to San Francisco.

Under section 10(a) of the Federal Power Act, 16 U.S.C. § 803(a), the Commission is required to measure each proposed project against an objective comprehensive plan for the optimum coördinated development of the entire waterway. See *United States ex rel. Chapman* v. *F.P.C.*, 345 U.S. 153, 168. Fulfillment of that duty in this case necessarily requires the Commission to consider the benefits San Francisco will derive from the project.

We think the Commission adequately performed this duty, insofar as present purposes are concerned, when it

accepted San Francisco's agreed monetary contribution to the project, arrived at after arm's-length bargaining between the districts and San Francisco as the measure of the latter's economic benefit from the project.

Under Article 37, the duty of the licensees with regard to fish releases is fixed for only the first twenty years of the license period, and this Article appears to provide for maximum use of the water available for fish releases or other conservation purposes during that period. The project, as licensed, is engineered to take advantage of the entire storage capability of the area, having in view the natural topographic configuration. The only way in which storage capacity could be increased would be to run a ring dike entirely around the reservoir.

There is thus no reasonable possibility, and indeed no contention, that had specific evidence pertaining to the economic value of the project to San Francisco been received, it might have warranted the Commission in requiring that storage capacity be enlarged for fish release or other conservation purposes by constructing such a dike. Nor is there reason to believe that, during that period, other measures such as the construction and operation of fish hatcheries will be needed.

It follows that, for this initial period, Commission inquiry into the question of the economic value of the project to San Francisco, in all likelihood, would not have enabled the agency to make any more favorable order, insofar as conservation is concerned, than it has already entered.

However, when it comes to the question of determining what needs to be done to protect the public interest during the last thirty years of the license period, a problem which the Commission, under Article 37, has reserved, the Commission will undoubtedly require additional evidence as to the benefits accruing to San Francisco. The Commission orders should not be construed as foreclosing such an inquiry.

With respect to any burdens imposed upon the districts at that time and as may be warranted by the value of the project to San Francisco, the districts will be entitled to reimbursement from San Francisco. Whether or not the districts and San Francisco already have, or hereafter enter into an agreement making clear their respective rights and obligations in such an eventuality, the position in which they have placed themselves before the Commission requires this result. San Francisco must be deemed to have acceded to this principle if it proceeds with its commitments under the New Don Pedro project.

The Secretary further argues that, under section 23(b) of the Federal Power Act, 49 Stat. 846 (1935), 16 U.S.C., § 817, San Francisco was a necessary joint applicant for the license, and the Commission erred in not requiring it to assume that status in the case. Under that section it is unlawful, among other things, for any person, state or municipality, for the purpose of developing electric power, to construct dams and the like upon any public lands of the United States, except under a license granted by the Commission. The Secretary contends that although San Francisco will not be a legal owner of the project, it is a direct beneficiary thereof, and so comes under the sanction of section 23(b).

We do not believe that section 23(b) is to be so broadly construed. San Francisco not only has no proprietary interest in the project works, but as the Commission found, it has no interest whatever in the power to be developed at New Don Pedro. Any upstream benefits which it may realize, as the Commission further found, ". . . will be only incidental to the main purpose of its participation, which is to acquire additional municipal water storage."

As long as the Commission requires the districts, as actual legal owners of the project works, to obtain a license, and as long as the duties and obligations imposed upon those owners, as licensees, take into account all the mone-

tary benefits to be derived by anyone from the project, the public interest is fully protected and the purpose of section 23(b) is achieved. We have indicated above that the Commission must take account of the benefits derived by San Francisco from the New Don Pedro project when it reviews the fish run problems as provided for in Article 37. We have also held that the Commission may at that time impose burdens upon the districts warranted by the benefits derived by San Francisco on the assumption that the latter will reimburse the districts for any such expenditures.

The Secretary and California have presented several additional arguments. Among these are the Secretary's contention that the Commission erred ". . . in wholly ignoring water quality and pollution problems," and in failing to consider the impact which Article 37 might have on the Federal Central Valley Project.[10] The state argues that the selection of a "dry" year definition by the Commission is not based upon evidence or reason, and the Commission failed to provide, in Article 40 of the terms and conditions, sufficient control over the temperature of the water releases.

We have reviewed each of these arguments, and others not mentioned above, and conclude that the Commission did not err with regard to any of them.

The orders under review are affirmed.

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[10] The Secretary in his petition for intervention mentioned neither of these contentions.

APPENDIX B

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Desert Land Act, 19 Stat. 377 (1877), as amended 43 U.S.C. § 321 (1958)

SECTION 1.

It shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of 25 cents per acre-to file a declaration under oath with the officer designated by the Secretary of the Interior of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter: *Provided, however,* That the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purposes of irrigation and reclamation; and all surplus water over and

above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said one-half section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the officer designated by the Secretary of the Interior of the reclamation of said tract of land in the manner aforesaid, and upon the payment to such officer of the additional sum of $1 per acre for a tract of land not exceeding three hundred and twenty acres to any one person, a patent for the same shall be issued to him. Except as provided in section 3 of the Act of June 16, 1955, as amended, no person may make more than one entry under sections 321-323, 325 and 327-329 of this title. However, in that entry one or more tracts may be included, and the tracts so entered need not be contiguous. The aggregate acreage of desert land which may be entered by any one person under this section shall not exceed three hundred and twenty acres, and all the tracts entered by one person shall be sufficiently close to each other to be managed satisfactorily as an economic unit, as determined under rules and regulations issued by the Secretary of the Interior.

Federal Power Act, 41 Stat. 1063 (1920), as amended 16 U.S.C. § 791 (1958)

SECTION 6 (16 U.S.C. § 799).

Licenses under sections 792, 793, 795-818, and 820-823 of this title shall be issued for a period not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions

of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice. Copies of all licenses issued under the provisions of sections 792, 793, 795-818, and 820-823 of this title and calling for the payment of annual charges shall be deposited with the General Accounting Office, in compliance with section 20 of Title 41.

SECTION 10 (16 U.S.C. § 803).

All licenses issued under sections 792, 793, 795-818, and 820-823 of this title shall be on the following conditions:

• • •

(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

SECTION 27 (16 U.S.C. § 821).

Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

SECTION 29 (38 Stat. 242).

All Acts or parts of Acts inconsistent with this chapter are repealed: *Provided,* That nothing contained in this chapter shall be held or construed to modify or repeal any of the provisions of the Act of Congress approved December 19, 1913, granting certain rights-of-way to the city and county of San Francisco, in the State of California.

Raker Act of 1913, 38 Stat. 242:

An Act Granting to the city and county of San Francisco certain rights of way in, over, and through certain public lands, the Yosemite National Park, and Stanislaus National Forest, and certain lands in the Yosemite National Park, the Stanislaus National Forest, and the public lands in the State of California, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby granted to the city and county of San Francisco, a municipal corporation in the State of California, all necessary rights of way along such locations and of such width, not to exceed two hundred and fifty feet, as in the judgment of the Secretary of the Interior may be required for the purposes of this Act, in, over, and through the public lands of the United States in the counties of Tuolumne, Stanislaus, San Joaquin, and Alameda, in the State of California, and in, over, and through the Yosemite National Park and the Stanislaus National Forest, or portions thereof, lying within the said counties, for the purpose of constructing, operating, and maintaining aqueducts, canals, ditches, pipes, pipe lines, flumes, tunnels, and conduits for conveying water for domestic purposes and uses to the city and county of San Francisco and such other municipalities and water districts as, with the consent of the city and county of San Francisco, or in accordance with the laws of the State of California in force at the time application is made, may hereafter participate in the beneficial use of the rights and privileges granted by this Act; for the purpose of constructing, operating, and maintaining power and electric

plants, poles, and lines for generation and sale and distribution of electric energy; also for the purpose of constructing, operating, and maintaining telephone and telegraph lines, and for the purpose of constructing, operating, and maintaining roads, trails, bridges, tramways, railroads, and other means of locomotion, transportation, and communication, such as may be necessary or proper in the construction, maintenance, and operation of the works constructed by the grantee herein; together with such lands in the Hetch Hetchy Valley and Lake Eleanor Basin within the Yosemite National Park, and the Cherry Valley within the Stanislaus National Forest, irrespective of the width or extent of said lands, as may be determined by the Secretary of the Interior to be actually necessary for surface or underground reservoirs, diverting and storage dams; together with such lands as the Secretary of the Interior may determine to be actually necessary for power houses, and all other structures or buildings necessary or properly incident to the construction, operation, and maintenance of said water-power and electric plants, telephone and telegraph lines, and such means of locomotion, transportation, and communication as may be established; together with the right to take, free of cost, from the public lands, the Yosemite National Park, and the Stanislaus National Forest adjacent to its right of way, within such distance as the Secretary of the Interior and the Secretary of Agriculture may determine, stone, earth, gravel, sand, tufa, and other materials of like character actually necessary to be used in the construction, operation, and repair of its said water-power and electric plants, its said telephone and telegraph lines, and its said means of locomotion, transportation, or communication, under such conditions and regulations as may be fixed by the Secretary of the Interior and the Secretary of Agriculture, within their respective jurisdictions, for the protection of the public lands, the Yosemite National Park, and the Stanislaus National Forest: *Provided,* That said grantee

shall file, as hereinafter provided, a map or maps showing the boundaries, location, and extent of said proposed rights of way and lands for the purposes hereinabove set forth: *Provided further,* That the Secretary of the Interior shall approve no location or change of location in the national forests unless said location or change of location shall have been approved in writing by the Secretary of Agriculture.

SEC. 2. That within three years after the passage of this Act said grantee shall file with the registers of the United States land offices, in the districts where said rights of way or lands are located, a map or maps showing the boundaries, locations, and extent of said proposed rights of way and lands required for the purposes stated in section one of this Act; but no permanent construction work shall be commenced on said land until such map or maps shall have been filed as herein provided and approved by the Secretary of the Interior: *Provided, however,* That any changes of location of any of said rights of way or lands may be made by said grantee before the final completion of any of said work permitted in section one hereof, by filing such additional map or maps as may be necessary to show such changes of location, said additional map or maps to be filed in the same manner as the original map or maps; but no change of location shall become valid until approved by the Secretary of the Interior, and the approval by the Secretary of the Interior of said map or maps showing changes of location of said rights of way or lands shall operate as an abandonment by the city and county of San Francisco to the extent of such change or changes of any of the rights of way or lands indicated on the original maps: *And provided further,* That any rights inuring to the grantee under this Act shall, on the approval of the map or maps referred to herein by the Secretary of the Interior, relate back to the date of the filing of said map or maps with the register of the United States Land Office as provided herein, or to the date of the filing of such maps as they may be copies of as provided

for herein: *And provided further*, That with reference to any map or maps hertofore filed by said city and county of San Francisco or its grantor with any officer of the Department of the Interior or the Department of Agriculture, and approved by said department, the provisions hereof will be considered complied with by the filing by said grantee of copies of any of such map or maps with the register of the United States Land Office as provided for herein, which said map or maps and locations shall as in all other cases be subject to the approval of the Secretary of the Interior.

SEC. 3. That the rights of way hereby granted shall not be effective over any lands upon which homestead, mining, or other existing valid claim or claims shall have been filed or made and which now in law constitute prior rights to any claim of the grantee until said grantee shall have purchased such portion or portions of such homestead, mining, or other existing valid claims as it may require for right-of-way purposes and other purposes herein set forth, and shall have procured proper relinquishments of such portion or portions of such claims, or acquired title by due process of law and just compensation paid to said entrymen or claimants, and caused proper evidence of such fact to be filed with the Commissioner of the General Land Office, and the right of such entrymen or claimants to sell and of said grantee to purchase such portion or portions of such claims are hereby granted: *Provided, however*, That this Act shall not apply to any lands embraced in rights of way heretofore approved under any Act of Congress for the benefit of any parties other than said grantee or its predecessors in interest.

SEC. 4. That the said grantee shall conform to all regulations adopted and prescribed by the Secretary of the Interior governing the Yosemite National Park and by the Secretary of Agriculture governing the Stanislaus National Forest, and shall not take, cut, or destroy any timber

within the Yosemite National Park or the Stanislaus National Forest, except such as may be actually necessary in order to construct, repair, and operate its said reservoirs, dams, power plants, water-power and electric works, and other structures above mentioned, but no timber shall be cut or removed from lands outside of the right of way until designated by the Secretary of the Interior or the Secretary of Agriculture, respectively; and it shall pay to the United States the full value of all timber and wood cut, injured, or destroyed on or adjecent to any of the rights of way and lands, as required by the Secretary of the Interior or the Secretary of Agriculture: *Provided,* That no timber shall be cut by the grantee in the Yosemite National Park except from land to be submerged or which constitutes an actual obstruction to the right or rights of way or to any road or trail provided in this Act: *Provided further,* That for and in consideration of the rights and privileges hereby granted to it the said grantee shall construct and maintain in good repair such bridges or other practicable crossings over its rights of way within the Stanislaus National Forest as may be prescribed in writing by the Secretary of Agriculture, and elsewhere on public lands along the line of said works, and within the Yosemite National Park as may be prescribed in writing by the Secretary of the Interior; and said grantee shall, as said waterworks are completed, if directed in writing by the Secretary of the Interoir or the Secretary of Agriculture, construct and maintain along each side of said right of way a lawful fence of such character as may be prescribed by the proper Secretary, with such suitable lanes or crossings as the aforesaid officers shall prescribe: *And provided further,* That the said grantee shall clear its rights of way within the Yosemite National Park and the Stanislaus National Forest and over any public land of any debris or inflammable material as directed by the Secretary of the Interior and the Secretary of Agriculture, respectively; and said grantee shall permit any road or trail which it may construct over the public lands, the Yosemite National

Park, or the Stanislaus National Forest to be freely used by the officials of the Government and by the public, and shall permit officials of the Government, for official business only, the free use of any telephone or telegraph lines, or equipment, or railroads that it may construct and maintain within the Yosemite National Park and the Stanislaus National Forest, or on the public lands together with the right to connect with any such telephone or telegraph lines private telephone wires for the exclusive use of said Government officials: *And provided further,* That all reservoirs, dams, conduits, power plants, water power and electric works, bridges, fences, and other structures not of a temporary character shall be sightly and of suitable exterior design and finish so as to harmonize with the surrounding landscape and its use as a park; and for this purpose all plans and designs shall be submitted for approval to the Secretary of the Interior.

SEC. 5. That all lands over which the rights of way mentioned in this Act shall pass shall be disposed of only subject to such easements: *Provided, however,* That the construction of the aforsaid works shall be prosecuted diligently, and no cessation of such construction shall continue for a period of three consecutive years, and in the event that the Secretary of the Interior shall find and determine that there has not been diligent prosecution of the work or of some integral and essential part thereof, or that there has been a cessation of such construction for a period of three consecutive years, then he may declare forfeited all rights of the grantee herein as to that part of the works not constructed, and request the Attorney General, on behalf of the United States, to commence suit in the United States District Court for the Northern District of California for the purpose of procuring a judgment declaring all such rights to that part of the works not constructed to be forfeited to the United States, and upon such request it shall be the duty of the said Attorney General to cause to be commenced and prosecuted

to a final judgment such suit: *Provided further,* that the Secretary of the Interior shall make no such finding and take no such action if he shall find that the construction or progress of the works has been delayed or prevented by the act of God or the public enemy, or by engineering or other difficulties that could not have been reasonably foreseen and overcome, or by other special or peculiar difficulties beyond the control of the said grantee: *Provided further,* That, in the exercise of the rights granted by this Act, the grantee shall at all times comply with the regulations herein authorized, and in the event of any material departure therefrom the Secretary of the Interior or the Secretary of Agriculture, respectively, may take such action as may be necessary in the courts or otherwise to enforce such regulations.

SEC. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: *Provided,* That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States.

SEC. 7. That for and in consideration of the grant by the United States as provided for in this Act the said grantee shall assign, free of cost to the United States, all roads and trails built under the provisions hereof; and further, after the expiration of five years from the passage of this Act the grantee shall pay to the United States the sum of $15,000 annually for a period of ten years, beginning with the expiration of the five-year period before mentioned, and for the next ten years following $20,000 annually, and for the remainder of the term of the grant shall, unless in the discretion of Congress the annual charge should be

increased or diminished, pay the sum of $30,000 annually, said sums to be paid on the first day of July of each year. Until otherwise provided by Congress, said sums shall be kept in a separate fund by the United States, to be applied to the building and maintenance of roads and trails and other improvements in the Yosemite National Park and other national parks in the State of California. The Secretary of the Interior shall designate the uses to be made of sums paid under the provisions of this section under the conditions specified herein.

SEC. 8. That the word "grantee" as used herein shall be understood as meaning the city and county of San Francisco and such other municipalities or water district or water districts as may, with the consent of the city and county of San Francisco or in accordance with the laws of the State of California, hereafter participate in or succeed to the beneficial rights and privileges granted by this Act.

SEC. 9. That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:

(a) That upon the completion of the Hetch Hetchy Dam or the Lake Eleanor Dam, in the Yosemite National Park, by the grantee, as herein specified, and upon the commencement of the use of any reservoirs thereby created by said grantee as a source of water supply for said grantee, the following sanitary regulations shall be made effective within the watershed above and around said reservoir sites so used by said grantee.

First. No human excrement, garbage, or other refuse shall be placed in the waters of any reservoir or stream or within three hundred feet thereof.

Second. All sewage from permanent camps and hotels within the watershed shall be filtered by natural percolation through porous earth or otherwise adequately purified or destroyed.

Third. No person shall bathe, wash clothes or cooking utensils, or water stock in, or in any way pollute the water within the limits of the Hetch Hetchy Reservoir or any reservoir constructed by the said grantee under the provisions of this grant, or in the streams leading thereto, within one mile of said reservoir; or, with reference to the Hetch Hetchy Reservoir, in the waters from the reservoir or waters entering the river between it and the "Early intake" of the aqueduct, pending the completion of the aqueduct between "Early intake" and the Hetch Hetchy Dam site.

Fourth. The cost of the inspection necessary to secure compliance with the sanitary regulations made a part of these conditions, which inspection shall be under the direction of the Secretary of the Interior, shall be defrayed by the said grantee.

Fifth. If at any time the sanitary regulations provided for herein shall be deemed by said grantee insufficient to protect the purity of the water supply, then the said grantee shall install a filtration plant or provide other means to guard the purity of the water. No other sanitary rules or restrictions shall be demanded by or granted to the said grantee as to the use of the watershed by campers, tourists, or the occupants of hotels and cottages.

(b) That the said grantee shall recognize the prior rights of the Modesto Irrigation District and the Turlock Irrigation District as now constituted under the laws of the State of California, or as said districts may be hereafter enlarged to contain in the aggregate not to exceed three hundred thousand acres of land, to receive two thousand three hundred and fifty second-feet of the natural daily flow of the Tuolumne River, measured at the La Grange Dam, whenever the same can be beneficially used by said irrigation districts, and that the grantee shall never interfere with said rights.

(c) That whenever said irrigation districts receive at the La Grange Dam less than two thousand three hundred and fifty second-feet of water, and when it is necessary for their beneficial use to receive more water the said grantee shall release free of charge, out of the natural daily flow of the streams which it has intercepted, so much water as may be necessary for the beneficial use of said irrigation districts not exceeding an amount which, with the waters of the Tuolumne and its tributaries, will cause a flow at La Grange Dam of two thousand three hundred and fifty second-feet; and shall also recognize the rights of the said irrigation districts to the extent of four thousand second-feet of water out of the natural daily flow of the Tuolumne River for combined direct use and collection into storage reservoirs as may be provided by said irrigation districts, during the period of sixty days immediately following and including April fifteenth of each year, and shall during such period release free of charge such quantity of water as may be necessary to secure to the said irrigation districts such four thousand second-feet flow or portion thereof as the said irrigation districts are capable of beneficially directly using and storing below Jawbone Creek: *Provided, however,* That at such times as the aggregate daily natural flow of the watershed of the Tuolumne and its tributaries measured at the La Grange Dam shall be less than said districts can beneficially use and less than two thousand three hundred and fifty second-feet, then and in that event the said grantee shall release, free of charge, the entire natural daily flow of the streams which it has under this grant intercepted.

(d) That the said grantee whenever the said irrigation districts desire water in excess of that to which they are entitled under the foregoing, shall on the written demand of the said irrigation districts sell to the said irrigation districts from the reservoir or reservoirs of the said grantee such amounts of stored water as may be needed for the beneficial use of the said irrigation districts at

such a price as will return to the grantee the actual total costs of providing such stored water, such costs to be computed in accordance with the currently accepted practice of public cost accounting as may be determined by the Secretary of the Interior, including, however, a fair proportion of the cost to said grantee of the conduit, lands, dams, and water-supply system included in the Hetch Hetchy and Lake Eleanor sites: upon the express condition, however, that the said grantee may require the said irrigation districts to purchase and pay for a minimum quantity of such stored water, and that the said grantee shall be entitled to receive compensation for a minimum quantity of stored water and shall not be required to sell and deliver to the said irrigation districts more than a maximum quantity of such stored water to be released during any calendar year: *Provided, however,* That if the said irrigation districts shall develop sufficient water to meet their own needs for beneficial use and shall so notify in writing the Secretary of the Interior, the said grantee shall not be required to sell or deliver to said irrigation districts the maximum or minimum amount of stored waters hereinbefore provided for, and shall release the said districts from the obligation to pay for such stored water: *And provided further,* That said grantee shall without cost to said irrigation districts return to the Tuolumne River above the La Grange Dam for the use of the said irrigation districts all surplus or waste water resulting from the development of hydroelectric energy generated by the said grantee.

(e) That such minimum and maximum amounts of such stored water to be so released during any calendar year as hereinbefore provided and the price to be paid therefor by the said irrigation districts are to be determined and fixed by the Secretary of the Interior in accordance with the provisions of the preceding paragraph.

(f) That the Secretary of the Interior shall revise the maximum and minimum amounts of stored water to be

supplied to said irrigation districts by said grantee as hereinbefore provided, whenever the said irrigation districts have properly developed the facilities of the Davis Reservoir of the Turlock Irrigation District and the Warner-Dallas Reservoir of the Modesto Irrigation District to the fullest practicable extent up to a development not exceeding in cost $15 per acre-foot storage capacity, and whenever additional storage has been provided by the said irrigation districts which is necessary to the economical utilization of the waters of said watershed, and also after water losses and wastes have been reduced to such reasonable minimum as will assure the economical and beneficial use of such water.

(g) That the said grantee shall not be required to furnish more than the said minimum quantity of stored water hereinbefore provided for until the said irrigation districts shall have first drawn upon their own stored water to the fullest practicable extent.

(h) That the said grantee shall not divert beyond the limits of the San Joaquin Valley any more of the waters from the Tuolumne watershed than, together with the waters which it now has or may hereafter acquire, shall be necessary for its beneficial use for domestic and other municipal purposes.

(i) That the said grantee shall, at its own expense, locate and construct, under the direction of the Secretary of the Interior, such weirs or other suitable structures on sites to be granted, if necessary, by the United States, for accurately measuring the flow in the said river at or above La Grange Dam, and measuring the flow into and out from the reservoirs or intakes of said districts, and into and out from any reservoirs constructed by the said grantee, and at any other point on the Tuolumne River or its tributaries, which he may designate, and fit the same with water-measuring apparatus satisfactory to said Secretary and keep such hydrographic records as he may

direct, such apparatus and records to be open to inspection by any interested party at any time.

(j) That by "the flow," "natural daily flow," "aggregate daily natural flow," and "what is naturally flowing," as are used herein, is meant such flow as on any given day would flow in the Tuolumne River or its tributaries if said grantee had no storage or diversion works on the said Tuolumne watershed.

(k) That when the said grantee begins the development of the Hetch Hetchy Reservoir site, it shall undertake and vigorously prosecute to completion a dam at least two hundred feet high, with a foundation capable of supporting said dam when built to its greatest economic and safe height.

(l) That the said grantee shall, upon request, sell or supply to said irrigation districts, and also to the municipalities within either or both said irrigation districts, for the use of any land owner or owners therein for pumping subsurface water for drainage or irrigation, or for the actual municipal public purposes of said municipalities (which purposes shall not include sale to private persons or corporations) any excess of electrical energy which may be generated, and which may be so beneficially used by said irrigation districts or municipalities, when any such excess of electric energy may not be required for pumping the water supply for said grantee and for the actual municipal public purposes of the said grantee (which purposes shall not include sale to private persons or corporations) at such price as will actually reimburse the said grantee for developing and maintaining and transmitting the surplus electrical energy thus sold; and no power plant shall be interposed on the line of the conduit except by the said grantee, or the lessee, as hereinafter provided, and for the purposes and within the limitations in the conditions set forth herein: *Provided,* That said grantee shall satisfy the needs of the landowners in

said irrigation districts for pumping subsurface water for drainage or irrigation, and the needs of the municipalities within such irrigation districts for actual municipal public purposes, after which it may dispose of any excess electrical energy for commercial purposes.

(m) That the right of said grantee in the Toulumne water supply to develop electric power for either municipal or commercial use is to be made conditional for twenty years following the completion of any portion of the works adapted to the generation of electrical energy, as follows. The said grantee shall within three years from the date of completion of said portion of the works install, operate, and maintain apparatus capable of developing and transmitting not less than ten thousand horsepower of electric power for municipal and commercial use, said ten thousand horsepower to be actually used or offered for use; and within ten years from the completion of said portion of the works not less than twenty thousand horsepower; and within fifteen years therefrom not less than thirty thousand horsepower; and within twenty years therefrom not less than sixty thousand horsepower, unless in the judgment of the Secretary of the Interior the public interest will be satisfied with a lesser development. The said grantee shall develop and use hydroelectric power for the use of its people and shall, at prices to be fixed under the laws of California or, in the absence of such laws, at prices approved by the Secretary of the Interior, sell or supply such power for irrigation, pumping, or other beneficial use, said prices not to be less than will return to said grantee the actual total costs of providing and supplying said power, which costs shall be computed in accordance with the currently accepted practice of public cost accounting, as shall be determined by the Secretary of the Interior, including, however, a fair proportion of cost of conduit, lands, dams, and water-supply system; and further, said grantee shall, before using any of said water for the purpose of developing hydroelectric power, file

such maps, surveys, field notes, or other data as may be required by law, and shall conform to any law existing and applicable to said subject of development of said hydroelectric power for municipal or commercial uses.

(n) That after the period of twenty years hereinbefore provided for the development, transmission, use, and sale of electric power, the Secretary of the Interior, under authorization hereby given, may require the grantee, within a time fixed by the Secretary, to develop, transmit, and use, or offer for sale, such additional power, and also such power less than sixty thousand horsepower as the grantee may have failed to develop, transmit, use, or sell, within the twenty years aforesaid, as in the judgment of said Secretary the grantee may or ought to develop under this grant, and which in his judgment the public interest demands or convenience requires; and in case of the failure of the grantee to carry out any such requirements of the Secretary of the Interior the latter is hereby authorized so to do, and he may, in such manner and form and upon such terms and conditions as he may determine, provide for the development, transmission, use, and sale of such additional power and such power not so developed, transmitted, or used by the grantee at the end of said twenty years up to sixty thousand horsepower; and for that purpose the Secretary of the Interior may take possession of and lease to such person or persons as he may designate such portion of the rights of way, structures, dams, conduits, and other property acquired or constructed by the grantee hereunder as may be necessary for the development, transmission, use, and sale of such power.

(o) That the rates or charges to be made by the grantee or by any lessee under the last preceding paragraph for the use of power for commercial purposes shall at all times conform to the laws of the State of California or, in the absence of any such statutory law, be subject to the approval of the Secretary of the Interior, and in the absence of such law no rates or charges shall be made,

fixed, or collected without such approval, and the grantee shall at any time, upon the demand of the Secretary of the Interior allow the latter or such person or persons as he may designate full and free access, right, and opportunity to examine and inspect all of the grantee's books, records, and accounts, and all the works constructed and property occupied hereunder by the grantee.

(p) That this grant is upon the further condition that the grantee shall construct on the north side of the Hetch Hetchy Reservoir site a scenic road or trail, as the Secretary of the Interior may determine, above and along the proposed lake to such point as may be designated by the said Secretary, and also leading from said scenic road or trail a trail to the Tiltill Valley and to Lake Vernon, and a road or trail to Lake Eleanor and Cherry Valley via McGill Meadow; and likewise the said grantee shall build a wagon road from Hamilton or Smiths Station along the most feasible route adjacent to its proposed aqueduct from Groveland to Portulaca or Hog Ranch and into the Hetch Hetchy Dam site, and a road along the southerly slope of Smiths Peak from Hog Ranch past Harden Lake to a junction with the old Tioga Road, in section four, township one south, range twenty-one east, Mount Diablo base and meridian, and such roads and trails made necessary by this grant, and as may be prescribed by the Secretary or the Interior. Said grantee shall have the right to build and maintain such other necessary roads or trails through the public lands, for the construction and operation of its works, subject, however, to the approval of the Secretary of Agriculture in the Stanislaus National Forest, and the Secretary of the Interior in the Yosemite National Park. The said grantee shall further lay and maintain a water pipe, or otherwise provide a good and sufficient supply of water for camp purposes at the Meadow, one-third of a mile, more or less, southeasterly from the Hetch Hetchy Dam site.

That all trail and road building and maintenance by the said grantee in the Yosemite National Park and the Stanislaus National Forest shall be done subject to the direction and approval of the Secretary of the Interior or the Secretary of Agriculture according to their respective jurisdictions.

(q) That the said grantee shall furnish water at cost to any authorized occupant within one mile of the reservoir and in addition to the sums provided for in section seven it shall reimburse the United States Government for the actual cost of maintenance of the above roads and trails in a condition of repair as good as when constructed.

(r) That in case the Department of the Iinerior is called upon, by reason of any of the above conditions, to make investigations and decisions respecting the rights, benefits, or obligations specified in this Act, which investigations or decisions involve expense to the said Department of the Interior, then such expense shall be borne by said grantee.

(s) That the grantee shall file with the Secretary of the Interior, within six months after the approval of this Act, its acceptance of the terms and conditions of this grant.

(t) That the grantee herein shall convey to the United States, by proper conveyance, a good and sufficient title free from all liens and encumbrances of any nature whatever, to any and all tracts of land which are now owned by said grantee within the Yosemite National Park or that part of the national forest adjacent thereto not actually required for use under the provisions of this Act, said conveyance to be approved by and filed with the Secretary of the Interior within six months after the said grantee ceases to use such lands for the purpose of construction or repair under the provisions of this Act.

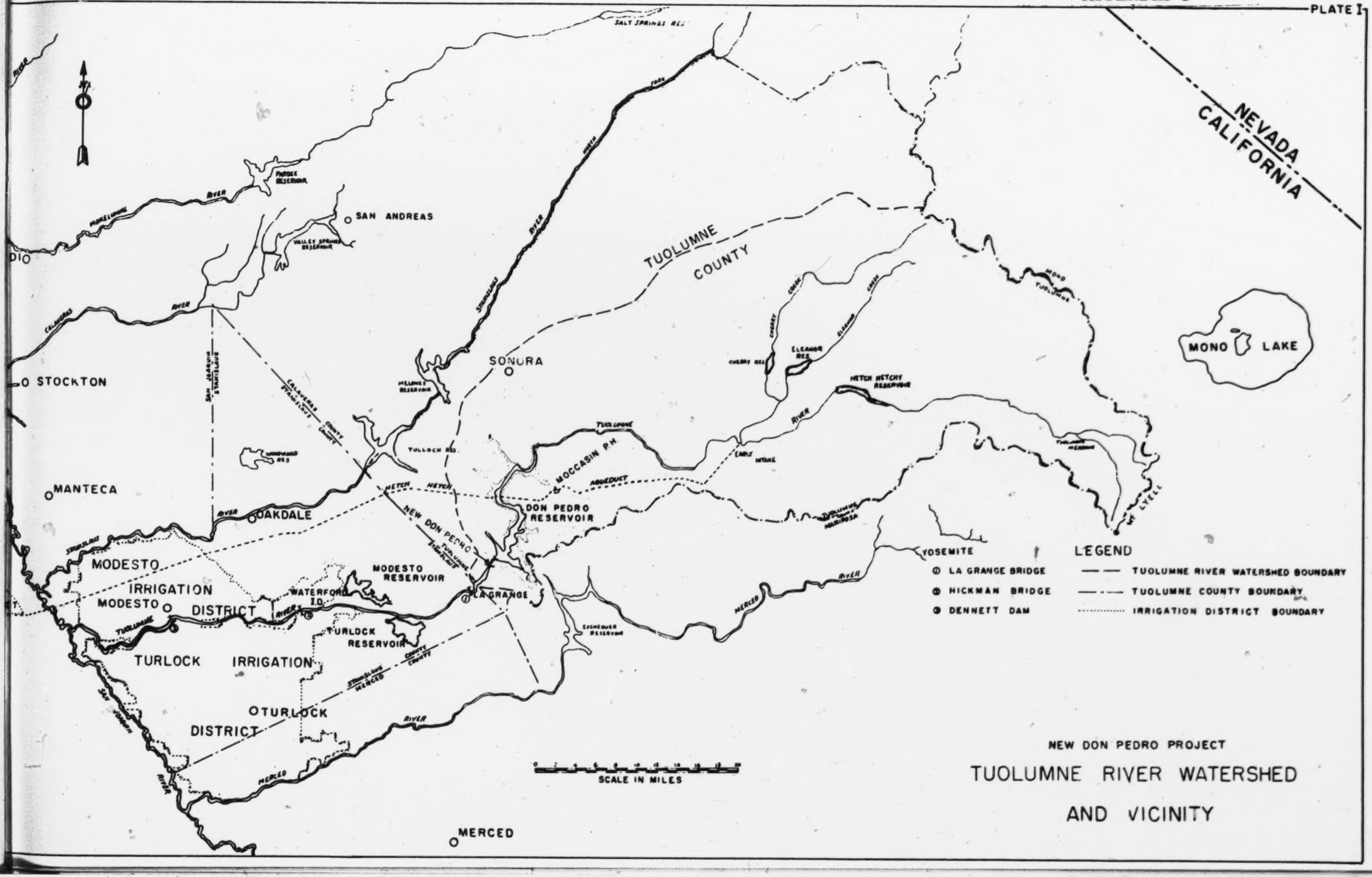
(u) That the city and county of San Francisco shall sell to the United States, for the use of the War Department, such water as the War Department may elect to take, and shall deliver the same through its system in or near the city of San Francisco to the mains or systems of such military reservations in that vicinity as may be designated by the Secretary of War, under such rules and regulations as he may prescribe. In payment for such water and the delivery thereof the United States shall pay to the said city and county of San Francisco a rental, to be calculated at a fixed rate per one thousand gallons, said rate not to exceed the actual cost of said water to said city and county for all the water so furnished, as determined by meter measurements: *And provided further,* That payment of said rental shall be made by the local disbursing officer of the War Department in the usual manner: *Provided, however,* That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act.

SEC. 10. That this grant, so far as it relates to the said irrigation districts, shall be deemed and held to constitute a binding obligation upon said grantee in favor of the said irrigation districts which said districts, or either of them, may judicially enforce in any court of competent jurisdiction.

SEC. 11. That this Act is a grant upon certain express conditions specifically set forth herein, and nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal

or other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State.

Approved, December 19, 1913.



NEW DON PEDRO PROJECT

TUOLUMNE RIVER WATERSHED AND VICINITY

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 580

THE PEOPLE OF THE STATE OF CALIFORNIA, PETITIONER

v.

FEDERAL POWER COMMISSION

No. 591

TURLOCK IRRIGATION DISTRICT, CALIFORNIA, AND MODESTO IRRIGATION DISTRICT, CALIFORNIA, PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet., No. 580, App. A, pp. 13-31; Pet., No. 591, App. A, pp. 1a-23a)

is reported at 345 F. 2d 917. The order (R. 648-702) of the Federal Power Commission is reported at 31 FPC 510, and the order on rehearing (R. 772-781) at 31 FPC 1128.[1] The Hearing Examiner's initial decision (R. 438-533) is reported at 31 FPC 535.

JURISDICTION

The judgment of the court of appeals (Pet., No. 591, App. A, pp. 1a-23a) was entered on May 18, 1965. A timely petition for rehearing was filed by petitioners in No. 591 and denied on June 22, 1965. The petition in No. 580 was filed on September 17, 1965;[2] the petition in No. 591 was filed on September 20, 1965. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTIONS PRESENTED

Two California irrigation districts with prior water rights in the Tuolumne River (the petitioners in No. 591) propose to construct and operate, partly on lands of the United States, a dam project which will develop hydroelectric power and permit water storage for municipal, flood control, and irrigation purposes. The City of San Francisco will benefit

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[1] See Errata Sheet for Joint Appendix (R. 702, 780-781) for corrections to R. 658, 674, 683, 774, and 776. A corrected R. 776 is appended hereto, see App. B, *infra*, pp. 23-24.

[2] As to the timeliness of the petition in No. 580, see note 16, p. 14, *infra*.

from the project and has agreed to contribute a substantial portion of the cost of construction. Downstream from the site of the proposed dam are important salmon fisheries which the Districts are now free to endanger by exercising their appropriative rights and diminishing the river flows. The Federal Power Commission has granted the districts a 50-year license to construct and operate the dam project with certain conditions designed to protect the river salmon —conditions which the Districts deem too onerous and which California alleges are insufficient. Against this background, the questions are:

1. Whether a license condition that may require the use of water that the applicants have the right to use for irrigation under State law "affects" or "interferes" with that law or any vested right acquired thereunder, in conflict with the saving clauses of Sections 27 and 29 of the Power Act, or constitutes a taking of property without compensation.

2. Whether it was unreasonable for the Commission to permit a reduction of water releases below the level required to fully protect downstream fish runs in low water years in order to preserve the economic feasibility of the project.

3. Whether the Commission acted unreasonably in deferring fixing the schedule of required water releases beyond the first twenty years of the license term until the economic feasibility of such releases can be determined and alternative modes of fish protection considered.

4. Whether the City of San Francisco should have been required to join as an applicant for the license.

STATUTES INVOLVED

The relevant statutory provisions are sections 4 (e), 23(b), and 313(b) (App. A, *infra.* pp. 18-22), and sections 6, 10(a), 27, and 29 (Pet., No. 591, App. B, pp. 25a-27a), of the Federal Power Act (Act of June 10, 1920, 41 Stat. 1063, *passim;* 49 Stat. 860; as amended, 16 U.S.C. 797(e), *passim;* and the Raker Act of 1913 (Pet. No. 591, App. B, pp. 27a-45a) (38 Stat. 242).

STATEMENT

The Tuolumne River rises in the Sierra-Nevada Mountains and flows westerly into the San Joaquin River (R. 439). The City of San Francisco maintains a series of large reservoirs and dams on the headwaters of the Tuolumne and diverts water at Early Intake for its municipal purposes, pursuant to the Raker Act (R. 649-650). Petitioners in No. 591 (hereinafter "Districts") own and operate the existing Don Pedro power and storage project many miles downstream on the Tuolumne, and the La Grange diversion dam four miles farther downstream (R. 650-651). The Districts are the sole distributors of irrigation water and electricity in their respective service areas situated in Stanislaus and Merced Counties, California (R. 440-441, 457-458).

The Districts' existing Don Pedro Dam is located in Tuolumne County. The proposed New Don Pedro Dam, if constructed, will be situated one and one-half miles downstream from the existing Don Pedro Dam and will inundate it (R. 650). In addition to La Grange Dam, the Districts own two smaller offstream

reservoirs (Turlock and Modesto Reservoirs) and a network of irrigation canals fed by gravity from the La Grange Dam pool (R. 441, 453-454). Fall-run king salmon spawn in the Tuolumne in a 20 mile reach of the river commencing about one and one half miles downstream from La Grange Dam (R. 676).

By the orders affirmed below, the Federal Power Commission approved the issuance of a 50-year license to the Districts for the New Don Pedro Project. That project (including the dam, reservoir, power house, and related project works) will be located in part on lands owned by the Districts but in greater part on lands which they do not own, including 2,868 acres of lands of the United States (R. 649). The Commission orders required operation of the project for the first 20 years so as to discharge specified schedules of water releases during the fall-run king salmon spawning season, even though water thus released can not be utilized by the Districts for irrigation purposes (R. 681-684). They reserved for later determination the requirements to be imposed for fish protection during the remainder of the license term (R. 676, 683). In so doing the Commission noted that 20 years later much more would be known about the limits of economic feasibility on the amounts of fish releases, and the possible alternative measures for fish protection that may then be available (R. 667-668). By 1985 alternate sources of water might become available or break-throughs might occur in artificial fish rearing methods which would provide for more economical protection of the salmon popula-

tion and the use of significantly smaller quantities of water (R. 667-668).

The Commission found that the Districts could service and redeem their bonded investment in the project under the prescribed mode of operation, which will preserve a minimum dependable capacity of 73,000 kilowatts (R. 667). It recognized that unprecedented low water conditions could require some curtailment in the use that could otherwise be made of water for irrigation purposes (R. 772-774).

The New Don Pedro Project will be multi-purpose, providing a larger reservoir, of which 811,000 acre feet would be used for irrigation storage by Districts, 340,000 acre feet for flood control storage by the United States, and 570,000 acre feet for exchange storage by San Francisco (R. 445, 447, 456, 674). The New Don Pedro Project would also include a powerhouse with 130,440 kilowatts of capacity (R. 674-675). In addition, in the non-flood-control season the Districts and San Francisco will share in the use of the storage not then needed for flood control (R. 674).

Under California law the Districts and San Francisco own virtually all the rights to divert water from the Tuolumne River. The Districts' water rights are older than those of San Francisco and have priority under California law (R. 52-62, 341-342). Section 9(b) and (c) of the Raker Act (Pet. No. 591, App. B, pp. 35a-36a) recognized the prior right of the Districts to 2,350 cubic feet per second the year round and a total of 4,000 cubic feet per second for sixty days each spring commencing April 15. In

order fully to utilize its investment in overland water transmission facilities, it will be advantageous to San Francisco to make its diversions at Early Intake, substituting storage of late fall, winter, and spring flows in the New Don Pedro reservoir to meet the Districts' water right priorities during low water seasons (R. 31-34, 445-446, 461-462).

The New Don Pedro Project will cost about $92,000,000 (R. 446). Slightly more than half that amount will be obtained by the Districts from sales of bonds to be serviced and redeemed from resulting power revenues (R. 659, 667). The balance will be borne by San Francisco's payments for the exchange storage upon a cost basis (R. 659-660, 670-671).

ARGUMENT

The Commission here granted the application of the Districts, petitioners in No. 591, for a license to use lands of the United States for a reservoir, dam, powerhouse, and other related works on the Tuolumne River.[3] The proposed project would develop hydroelectric power, provide storage for municipal, irrigation and flood control purposes, provide recreational facilities, and some water for protection of fish life. The license offered to the Districts contained a requirement (R. 681-683) that the project be so oper-

[3] The applicability of the licensing provisions of Part I of the Federal Power Act being clear from the fact that the use of lands of the United States is necessary for the construction, operation, and maintenance of the project works (see *infra*, p. 5), no evidence was introduced as to any other basis for the licensing.

ated as to provide specified minimum downstream flows during the fall run of king salmon to maintain spawning beds and thereby preserve the river as a fishery resource. In No. 591, the Districts complain that the requirement is too burdensome; in No. 580, California argues that it is not sufficient.

1. The Districts object to the so-called "fish release" provision because, unless modified in the event of an unprecedented shortage of water (which the Commission found no basis to anticipate),[4] the requirement might result in the use of some of the water to which the Districts are entitled by prior appropriation under State law. Their argument is that, since no one else could be licensed to interfere with their prior right of use of that water for irrigation without compensation, they cannot be required to suffer the interference simply because they are the licensees.

This is an obvious *non sequitur*. It may freely be conceded that the water rights the Districts contend will be impaired are rights under California law relating to the "control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses," within the meaning of Section 27 of the Power Act.[5] That is, they are rights under State

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[4] The Commission said (R. 774): "We do not expect this situation [*i.e.*, conflict between the irrigation needs for the water and needs for fish releases] to arise, but if it should we would consider such modification of the license to the extent shown to be necessary in the public interest."

[5] For the wording of Section 27, see Pet. No. 591, App. B, p. 26a. The Districts' arguments based on the Desert Land Act, (Pet. 17-18), and the Raker Act of 1913 and Section 29

law "not superseded by the terms of the Federal Power Act," in the words of *First Iowa.*[6] But it does not follow that the water covered by such rights cannot be devoted to the purposes of a licensed project if the license applicant who owns or will acquire such rights so proposes, or if the applicant agrees to a Commission condition that requires it.

Indeed, the Districts assume that it would suffice if a project owner who (unlike the Districts) does not himself own the water rights affected by the prescribed operation of the project were to acquire the right of interference from the owners (Pet. p. 24). Many projects could not be constructed or operated without such acquisitions.[7] Yet, when an applicant

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of the Federal Power Act (Pet. 21-23), are merely cumulative and are subject to the same error. Moreover, the assumption made by the Districts that the condition prescribed by the Commission will require use of water that San Francisco is entitled to use under the Raker Act, is wholly erroneous. The Commission made allowance for all of San Francisco's uses. R. 657, 658, n.8, 662, 666, 668-669.

[6] *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U.S. 152, 175-176, as quoted in the Districts' petition, No. 591, pp. 12-13. The Court there also spoke of the "need for an express 'saving' clause in the Federal Power Act if the usual rules of supersedure are to be overcome," in obvious reference to the fact that the licensing provisions of Part I are in large part designed to apply to projects of the kind involved in that case that are subject to the jurisdiction of Congress under the Commerce clause, as well as those of the kind involved here that are subject to its jurisdiction only under its power over lands of the United States.

[7] See, for example, *First Iowa, supra*, 328 U.S. at 158, where the applicant for license proposed to acquire by purchase all,

for license already owns some or all of the necessary water rights which he contributes to the operation of the project there is no greater impairment of those rights than there would be if they had to be acquired for that purpose after the license is issued.[8] As the Court has said repeatedly of the similar language of § 8 of the Reclamation Act,[9] the model for Section 27

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and had obtained option on 98%, of the downstream riparian rights that would be needed because the operation of the project as proposed would divert a large part of the flow of the river from its natural channel.

[8] The Districts argue (Pet. 20) that the Commission's power to impose such a condition discriminates "against license applicants which are public agencies having vested irrigation and municipal water rights [because they] * * * would be required to surrender those rights without compensation as a condition to receiving a license, while license applicants possessing no such rights could not be similarly burdened." The argument overlooks the obvious fact that if any one other than a public agency were licensed for such a project it would have to bear as great a burden because it would have to acquire the water rights. Either would be allowed his original cost of acquiring such rights for Power Act purposes.

[9] Section 8 reads as follows: "Nothing in * * * [this Act] shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing * * * [herein] shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof." 43 U.S.C. 383.

of the Power Act [10] (*Arizona* v. *California*, 373 U.S. 546, 586):

> As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. * * *

Section 27 simply makes clear that the license is not the source of such rights.[11] As the court below had

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[10] *Portland General Electric Co.* v. *Federal Power Commission*, 328 F. 2d 165, 176 (C.A. 9). In the debate on the Ferris bill (H.R. 16673, 63rd Cong., 2d Sess.)—a predecessor to the bill that became the Federal Water Power Act—Congressman Raker said of section 14 of that bill which was substantially identical to the present Section 27 of the Power Act (H. Rep. No. 842, 63rd Cong., 2d Sess., p. 4): "* * * But let me call the attention of the gentleman to the fact that this provision is in the reclamation act, and when the Government attempts to obtain a water right under the reclamation law for its reservoirs, for its dams, and for its irrigation projects it goes into the State and files its application for a water right, and commences the construction of the dam and ditches, just the same as a private individual, and its right is determined and disposed of under the same law as though the gentleman himself had gone into the State of California, or Oregon, or Nevada, and applied for a water right. * * *" 51 Cong. Rec. 14071.

[11] The Commission has repeatedly treated controversies with respect to ownership of needed water rights as matters to be determined locally under state law and has refused to allow such questions to interfere with its licensing decisions, leaving the licensee to procure any such rights that it does not hold. *East Bay Municipal Utility District*, 1 FPC 12, 13; *Oakdale Irrigation District and South San Joaquin Irrigation District, and Tuolumne County Water District No. 2*, 10 FPC 810, 811. The decision in *Southern California Edison Co.*, 8 FPC 364, 385-386, had the same effect, notwithstanding some of the language in the opinion.

previously held in *Portland General Electric Co.* v. *Federal Power Commission*, 328 F. 2d 165, 176, to which it referred in the present case (Pet. No. 591, App. A, pp. 9a-10a):

> * * * The only purpose of section 27 is to preserve to holders of state-conferred water rights a right to compensation if those rights are taken or destroyed as an incident to the exercise *by another*, of a license granted by the Commission [emphasis supplied; footnote omitted].

The license condition that requires the devotion of such rights to the purposes of the project does not "impair," "interfere with," or "take" such water rights, any more than the usual license provisions "impair" any of the rights in land, rights-of-way, flowage rights, or easements that they require the licensee to devote to the project, or "impair" the money they require the licensee to invest. The applicant need not accept the license and proceed with the proposed project if it does not wish to devote the necessary rights or capital to the enterprise.[12]

This is not to say that the present condition may be expected to result in the applicants' rejection of the license and abandonment of the proposed project. The Commission carefully tested the economic feasibility of the project with this obligation attached and its findings in that regard are not controverted by the Districts. Significantly, it was the Commission's

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[12] There is, therefore no question of a taking in violation of the Fifth Amendment, as the Districts argue (Pet. 23-24), so long as the condition is reasonable and in accord with Section 10(a).

inability to determine the limits of economic feasibility as it might be affected by fish releases after the first twenty years that caused it to prescribe the amounts of minimum required flows only for the first twenty years, leaving the requirements thereafter for later determination when the limits of economic feasibility and the possible alternative measures that may then be available can better be appraised.[13] This does not mean, as the Districts argue, that they are required "to give the Commission a blank check" (Pet. 19-20). The Commission specified the standards governing such future determinations, including the standard of economic feasibility of project operation under the terms to be prescribed.[14] As the court below concluded (Pet. No. 591, App. A, pp. 11a-13a) from a full consideration of the Districts' contention, the condition, "provide[s] as much precision and definiteness in this regard as is presently practicable." Section 6, which requires that the terms and conditions of the license shall be expressed in the

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[13] R. 666-669, 775-776. (Attention may be called to the fact that an errata sheet to the printed record makes corrections to page 776 of the record. For a reprint of R. 776 embodying the corrections, see App. B, *infra*, pp. 23-24.)

[14] The public interest in preservation of the fish resources of the river is served because, as the Commission said (R. 657): "* * * even without such a condition the salmon runs would be preserved longer with New Don Pedro than with existing Don Pedro. On the basis of the record we would expect that New Don Pedro could be operated without adverse effect on the salmon runs until after 1985 * * * whereas without New Don Pedro it appears that the fish would be seriously affected, if not destroyed, after 1968 * * *."

license, does not require impracticable specificity of detail.[15]

2. California, petitioner in No. 580,[16] reiterating contentions rejected by both the Commission and the court of appeals, argues that maintenance of even larger downstream flows than those specified should be required in low water years, that minimum flows should be specified now for the full 50-year term of the license (instead of providing that the amounts for the last thirty years would be determined later), and that the City of San Francisco should have been made a party to the license.[17] The Secretary of the Interior

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[15] Similar reservations are often made in issuing Part I licenses and, where they have been before the courts on review, have given rise to no difficulty. See *Idaho Power Co.* v. *Federal Power Commission*, 346 F. 2d 956, 958-959 (C.A. 9), pending on petition for certiorari, S.Ct. No. 630, O.T. 1965, filed Sept. 29, 1965; *Public Utility District No. 1 of Pend Oreille County* v. *Federal Power Commission*, 308 F. 2d 318, 323 (C.A.D.C.), certiorari denied, 372 U.S. 908; *Pacific Power & Light Co.* v. *Federal Power Commission*, 333 F. 2d 689, 692-693 (C.A. 9), certiorari denied, 379 U.S. 969.

[16] While we do not urge it as a bar to consideration of California's petition, we note a timeliness question in No. 580. That petition, filed September 17, 1965, is out of time unless the 90-day period is computed from the date the court below denied a petition for rehearing filed by the petitioners in No. 591—California itself not having applied for rehearing. Because the only petition for rehearing was submitted by adversary parties and raised somewhat different issues, California's present contentions may not have been preserved. Cf. *Federal Trade Commission* v. *Minneapolis-Honeywell*, 344 U.S. 206.

[17] California plainly means the City should have been made a joint licensee—not merely a party to the proceeding. The

advanced like contentions below (R. 536-607, 703-731). The Solicitor General takes no position with respect to the correctness of the rulings on these points, believing that the questions presented by California's petition are not of such character as to require re-examination in this Court. No conflict of any kind is suggested; the matters sought to be raised are largely within the discretion of the Federal Power Commission to decide; and the reviewing court has concluded, after full consideration, that the agency did not act arbitrarily. See *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 21-23; cf. *American Power & Light Co.* v. *Securities & Exchange Commission*, 329 U.S. 90, 112-113; *United States* v. *City and County of San Francisco*, 310 U.S. 16, 29-30; *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232, 236-237.

On the merits, the Federal Power Commission defends the correctness of the rulings below, disputing California's contentions upon the following grounds:

(*a*) For the first twenty years, the amounts of water required to be released to protect the salmon

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point is preserved in its application for rehearing before the Commission (R. 768) where it said: "* * * The most effective procedure for ascertaining the benefits to be derived by the City and County of San Francisco would be to require them to became an applicant for license in that project. This procedure was requested by the Secretary of the Interior in its motion filed on July 20, 1963. We submit that this motion should have been granted * * *".

No different objection can be considered now. *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 307; *Utah Power & Light Co.* v. *Federal Power Commission*, 339 F. 2d 436, 438 (C.A. 10).

in the river are precisely those suggested by California itself, the only dispute being over the method of determining the "dry years" when lesser releases are provided for. The Commission defined "dry years" in terms of the actual available water at the crucial point, whereas California would ignore upstream diversions and base the computation on a hypothetical river flow. Yet, the sole reason for decreasing the required releases in "dry years" is to lessen the burden on the licensees during periods of low water so as not to imperil the economic feasibility of the project (R. 660-664)—not because the need for water to preserve the salmon is then reduced. Accordingly, the Commission deemed it appropriate to look to the actual supply of water, not what would be theoretically available if no upstream diversions occurred.

(*b*) The Commission deferred consideration of the conditions to be imposed upon the licensees for the last 30 years of the license because it thought that the more acute problems of accommodation anticipated for that time might well be subject to a new solution in light of changed circumstances. As already noted, the Commission reasoned that the wiser course was to await a time when more would be known about the limits of economic feasibility as affecting the amounts of fish releases and about possible alternative measures for fish protection (R. 658-659).

(*c*) Finally, the Commission answers the suggestion that the City of San Francisco should have been made a party by reference to Section 23(b) of the

Power Act which requires only those who "construct, operate, or maintain" a project to obtain a license. See, also, Section 4(c) of the Act.

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be denied.

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November, 1965

APPENDIX A

STATUTES INVOLVED

The Federal Power Act, June 10, 1920, 41 Stat. 1063, *et seq.*, as amended (16 U.S.C. 791a-825r), provides in part:

> 4(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization

of such reservation: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the commission and shall become a part of the records of the commission: *Provided further*, That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the fact and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * * *

23(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters

of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws.

* * * *

313(b) Any party to a proceeding under this Act aggrieved by an order issued by the Com-

mission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evi-

dence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

APPENDIX B

Reprint of page 776 of the Record to show incorporation of errata sheet corrections (see note 1, *supra*, p. 2).

relevant evidence to aid our determination. It is not unreasonable that this should be so, since this is not a case where the licensing of the project will create a fish problem. As Opinion No. 420 makes clear, this project will greatly relieve an existing situation in which the fish would soon be destroyed if the project were not built. Even without the prescribed fish releases, the construction of the new project would be beneficial to the salmon runs; and with the required releases, there will be a maximum use of the river for the benefit of all interests. Under these circumstances, and as provided in Opinion No. 420, the fish interests will have the primary obligation for showing the need for continuing releases from New Don Pedro at the end of the 20-year period if such releases are to be ordered. The applicants, however, will have to show, *inter alia*, the water required to maintain the economic feasibility of their project; the water available at New Don Pedro for irrigation, power, and conservation purposes; the availability of any alternative sources of water for such purposes or other alternative solutions to the fish problem as it may then exist; and their then existing and expected future needs for water for irrigation purposes. San Francisco will also be required to make a showing of its then existing and expected future needs for water for municipal purposes, and to demonstrate

the interrelation of New Don Pedro with the operation of its Hetch Hetchy municipal water supply and power system.

California and the Secretary also question the burden put on them of finding and financing future solutions to the fish problem. With respect to the interim studies of alternative methods of preserving the fish, it is in the interest of all of the parties to cooperate in finding a mutually agreeable solution. Our order cannot bind California or the Secretary of the Interior to undertake such studies or to contribute to their cost. We do, however, expect that these parties will cooperate with the applicants in the interest of conservation. Article 39 directs the applicants to make such studies with the cooperation of Cali-

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IN THE

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OCTOBER TERM, 1965

No. 591

TURLOCK IRRIGATION DISTRICT, CALIFORNIA AND MODESTO IRRIGATION DISTRICT, CALIFORNIA, *Petitioners,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Brief of the States of Kentucky, Nebraska, New York, North Dakota, South Dakota and Wyoming as Amici Curiae in Support of Petition for Writ of Certiorari

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Amici Curiae Brief in Support of Petition For Writ of Certiorari

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The States of Kentucky, Nebraska, New York, North Dakota, South Dakota, and Wyoming through their Attorneys General, respectfully submit this joint brief as amici curiae under Rule 42(4) in support of the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit filed by the Turlock and Modesto Irrigation Districts, public agencies of the State of California.

REASONS FOR GRANTING THE WRIT

1. The case presents questions of substantial importance affecting the jurisdiction of the States over the determination of consumptive use rights on streams within their boundaries.

The States have traditionally exercised jurisdiction over the determination of relative rights to the beneficial consumptive use of the waters within their boundaries. In the non-public land Eastern States, this power emanated from those held by the original colonies upon adoption of the Constitution. In the public land States of the West, similar jurisdiction in the States was confirmed by Congress in the Acts of 1866,[1] 1870[2] and 1877,[3] which this Court has construed [4] as providing that water rights were to be acquired in the manner provided by the law of the State of location.[5] Thus, until this case the security of title and right to water use has depended solely upon State law.

Pursuant to this, the States have over the years established administrative and judicial procedures for the establishment of irrigation, municipal and other use rights to these waters as between all users,

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[1] Rev. Stat. § 2339 (1875), 30 U.S.C. § 51 (1958).

[2] Rev. Stat. § 2340 (1875), 30 U.S.C. § 52 (1958).

[3] 19 Stat. 377 (1877), as amended, 43 U.S.C. § 321.

[4] *Jennison* v. *Kirk*, 98 U.S. 453 (1879); *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 163-164 (1935); see *Nebraska* v. *Wyoming*, 325 U.S. 589, 611-616 (1945); *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 448 (1955).

[5] Congress has reiterated this policy in some 35 different statutes. See collection in *Hearings Before The Subcommittee On Irrigation And Reclamation Of The Senate Committee on Interior and Insular Affairs On S. 1275*, 88th Cong., 2d Sess. 302-10 (1964).

including the United States.[6] The State proceedings expressly adjudicate the relative rights to the use of water between respective irrigation and municipal uses and all other conflicting uses, including uses for fish. Millions of dollars are invested in water projects in reliance upon these State determinations of proprietary rights.

The decision of the Ninth Circuit shakes this entire foundation. It rejects a water right determination made by California in 1953 and approves an FPC license which will impair irrigation water rights held under permit, license, and appropriation, some of which are over a hundred years old. The court held "... [T]he [Federal Power] Commission has the legal authority to take appropriate action restricting the use of such irrigation rights ..." (345 F. 2d at 924). Thus, in any situation where a license is required, the court holds the Federal Power Commission may take irrigation and municipal use rights vested under State law and reallocate those waters to other users regardless of any conflicting State determination. Under such a holding, State granted water rights are completely negated.

This newly found jurisdiction in the Federal Power Commission over irrigation and municipal rights is not limited to instances of irrigation versus fish. The holding below would equally clearly empower the Commission to reallocate uses on a river between classes of irrigation users, or between irrigation and municipal users or other users. For instance, the Commission could decide that the "best comprehensive develop-

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[6] See *Nebraska* v. *Wyoming*, 325 U.S. 589, 611-616 (1945); *United States* v. *Fallbrook Public Utility District*, 347 F. 2d 48, 55 (9th Cir. 1965).

ment of a waterway" would be to require farmers to yield up their irrigation water to industrial use, regardless of how long established and how prior the irrigation rights were under State law.

Thus, the decision below would, for the first time, we believe, permit the Federal Power Commission to duplicate and supersede State decisional processes for the determination of relative consumptive use rights, This is an important question affecting the traditional jurisdiction of the States which should be considered by this Court.

2. The decision below is clearly wrong

The decision below fails even to refer to this Court's leading decision of *First Iowa Hydro-Elec. Coop.* v. *Federal Power Comm'n.*, 328 U.S. 152, 175-177 (1946), which rules that Congress in enacting Section 27 of the Federal Power Act intended to protect or "save" state laws "as to the control, appropriation use or distribution of water in irrigation or for municipal or other uses of the same nature" from supersedure by the act. This Court concluded:

> This section therefore is thoroughly consistent with the integration rather than the duplication of federal and state jurisdictions under the Federal Power Act. It strengthens the argument that, in those fields where rights are not thus "saved" to the states, Congress is willing to let supersedure of the state laws by federal legislation take its natural course. (328 U.S. at 176).

Furthermore, the court below made no reference to the clear unambiguous legislative history of Section 10(a) of the Act, showing that Congress twice eliminated language which might have been deemed to give the Federal Power Commission control over consump-

tive use water rights on issuing a license.[7] The elimination of the word "irrigation" from Section 10(a), as the debate makes clear, was for the express purpose of reserving the control and determination of consumptive use rights to the States, as set forth in Section 27 of the Act. Thus, there is no conflict between Sections 10(a) and 27 of the Act as the court below hypothecated—both are consistent in their recognition that the States, not the Federal Power Commission, are to have the final jurisdiction over irrigation and municipal consumptive uses of water.

Up to the present time, the Federal Power Commission has never claimed authority to control these uses.[8] To the contrary, the Commission in a long line of cases has consistently recognized that it can do nothing in licensing a project that would impair irrigation and municipal use rights acquired under State law.[9] This

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[7] 58 Cong. Rec. 2134-35 (1919). 56 Cong. Rec. 9114-15, 9901-03 (1918).

[8] Even in the present case, the Federal Power Commission declined to decide whether it could invade irrigation and municipal use rights vested under State law, although the court below so held after deciding that the issue must be reached because the Commission's order had such an effect.

[9] *East Bay Municipal Utility District*, 1 F.P.C. 12, 13 (1932); *Southern California Edison Co.*, 8 F.P.C. 364, 384-85 (1949); *Fresno Irrigation District, et al.*, 8 F.P.C. 348, 355, 357 (1949); *Oakdale Irrigation District, et al.*, 10 F.P.C. 810, 811 (1951); *California Oregon Power Co.*, 13 F.P.C. 1, 5, 8, 9 (1954). See also *California Oregon Power Co.*, 23 F.P.C. 59, 65, 18 F.P.C. 364, 368 (1957) amending 15 F.P.C. 14, 15, 22 (1956); *Montana Power Co.*, 15 F.P.C. 1330, 1337 (1956) (Article 31); *Public Utility District No. 1 of Okanogan County, Washington*, 15 F.P.C. 1602, 1604 (1956) (Article 25); *California Oregon Power Co.*, 13 F.P.C. 1, 8-9 (1954); *Portland General Electric Co.*, 10 F.P.C. 445, 458-459 (1951) (Article 28); *Fresno Irrigation District, et al.*, 10 F.P.C. 460, 464-465 (1951); *Montana Power Co.*, 10 F.P.C. 884 (1951); *Oakdale Irrigation District, et al.*, 10 F.P.C. 1278, 1281 (1951) (Article 29); *Niagara Falls Power Co.*, 9 F.P.C. 228, 254 (1950); *Great Northern Power Co.*, 1 F.P.C. 124 (1933).

well established administrative construction, which recognizes final authority in the States over consumptive uses, is alone consistent with the integration of State and Federal jurisdictions over water resources development established by Congress in the Federal Water Power Act and recognized by this Court in *First Iowa.*

CONCLUSION

The decision of the court below authorizing the Federal Power Commission for the first time in issuing power licenses to duplicate and supersede the States' jurisdiction over consumptive uses of water is clearly wrong as a matter of law. The Federal Power Commission should properly only be granted such broad new powers by express action of the Congress, not by judicial decision that runs counter to the declared purpose of the Act and forty-five years of established Federal-State relations thereunder. With the ever increasing importance of consumptive uses of our streams, this Court should review the decision to determine whether Congress in 1920 intended to establish the Federal Power Commission as the supreme arbiter of irrigation and municipal uses or to leave this jurisdiction to the States.

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v.

FEDERAL POWER COMMISSION, *Defendant*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY OF PETITIONERS TO THE BRIEF OF THE FEDERAL POWER COMMISSION IN OPPOSITION

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---

REPLY OF PETITIONERS TO THE BRIEF OF THE FEDERAL POWER COMMISSION IN OPPOSITION

The Brief of the Federal Power Commission in Opposition provides no valid ground for denying review of the important issues under the Federal Power and Raker Acts decided by the Ninth Circuit on which the Districts seek certiorari. Nowhere does the Commission argue that the issues raised by the Districts are unimportant to the administration of the Federal Power Act (and conversely to the States in the administration of irrigation and municipal use water rights), or are settled by decisions of this Court, or are established by any administrative practice, so as to

obviate review.[1] Rather, the Commission opposes the District's petition on a novel effort to distinguish *First Iowa* and other existing precedents of this Court and upon an erroneous view of the record as to the impact of the decision below on the proposed project.

1. The Commission, while admitting that this Court's *First Iowa* decision construed Section 27 as saving to the States and precluding Commission jurisdiction over the "control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses" (Br. Op. 8-9), would circumvent that decision on the premise that no applicant can object to a license condition taking such rights because the applicant need not accept the license so tendered. But under this logic *any* condition sought to be imposed by the Commission, regardless of the Act's limitations, could never be challenged because licenses must always be accepted before effective. This view would give the Commission unlimited power to impose any condition without regard to the strictures of the Act. That the Commission aparently so construes its authority is seen from its failure to even consider in its brief the clear intent of Congress in enacting Sections 10(a) and 27 to withhold Commission jurisdiction to alter or control any State consumptive use, or the plain language of Section 29 of the Federal Power Act precluding the Commission from modifying or amending any of the terms of the Raker Act of 1913.[2]

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[1] In contradistinction, the Government does argue that the questions raised by the petition of California in No. 580 "are not of such character as to require re-examination in this Court." (Br. Op. 15.)

[2] The Commission's basic assumption that it has jurisdiction to reallocate irrigation and municipal consumptive uses regardless of § 27 as construed in *First Iowa*, § 10(a), and § 29, is made quite clear when the Commission argues in effect that if a private power company were seeking a license for New Don Pedro the Commission could order it to take the Districts' vested irrigation rights (downstream) to reallocate those waters to fish, regardless of a conflicting State adjudication according priority to the Districts' irrigation uses over fish (see Br. Op. 10, fn. 8).

The Commission's novel theory that "acceptance" obviates inquiry into the legality of a proposed condition is clearly erroneous. In *First Iowa* this Court set forth its view of the effect of Section 27 while addressing itself to the considerations the Commission was to utilize in the licensing process.[3] Furthermore, Section 313(b) of the Act providing for judicial review of the Commission's action on issuing a license would be meaningless if the applicant's ultimate option to accept the license precluded review as to whether the Commission exceeded its statutory authority.

2. The Commission's attempt in its brief to minimize the impact of the Ninth Circuit's holding that "the Commission has the legal authority to take appropriate action restricting the use of such irrigation rights, should the occasion arise" (App. 11a), is erroneous and contrary to the record. This holding on the direct review proceedings under Section 313(b), if not reversed, can never be challenged subsequently. *Tacoma* v. *Taxpayers of Tacoma,* 357 U.S. 320 (1958). Thus, the Districts are required to subject all of their vested irrigation water rights acquired under State law and recognized by the Raker Act, to the unlimited discretion of the Federal Power Commission for future reallocation to other uses.[4]

The practical consequences to the Districts are grave. The Examiner expressly found that there would be impair-

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[3] In *Federal Power Commission* v. *Niagara Mohawk Power Corp.,* 347 U.S. 239 (1954), this Court confirmed its *First Iowa* construction of Section 27 as protective of a licensee and as applicable on the issuance of a license under Section 10(a), stating: "In *First Iowa* . . . § 27 of the Act was discussed in relation to conditions *controlling the approval of projects.*" (347 U.S. at 256; emphasis supplied.)

[4] The terms of Article 37 regarding future releases after 20 years place no restrictions on impairment of the Districts' irrigation rights. The decision below that economic feasibility of the project will be maintained poses no guarantee of water availability for irrigation.

ment, even below the irrigation supply available to the Districts in critical years from their existing project, under California Fish and Game's releases (JA 493-494). He accordingly imposed no fixed releases. After the Commission adopted those release schedules in its Article 37, with slight modification, the Districts demonstrated in their petition for rehearing that there would still be substantial impairment of their irrigation and Raker Act entitlements during the first 20 years of project operation, based on repetition of the historical hydrology of record (JA 734-739), not on "unprecedented" conditions (Br. Op. 6, 8). Accordingly, if the Commission's "unprecedented low water conditions" (Br. Op. 6) should occur, the impact of releases under Article 37 foreseeably would be more severe than that found by the Examiner.[5]

In the circumstances, the Districts are convinced that the Examiner was correct in adopting the conclusion that:

> "... By 1985 the dependable minimum year irrigation supply under New Don Pedro with the fish conditions would be about 546,000 acre-feet or more than 100,000 acre-feet less than that of existing Don Pedro. Certainly no farmer can be expected to pay more for a new project that will provide less water. He would rightly ask why such a project should be built at all." (JA 495)

The Districts are accordingly faced with a costly project to be built, if at all, at the sacrifice of their existing project, with no assurance that the new project will be permitted to perform its essential purpose of conservation for water-short years. This project should not be vetoed through

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[5] Furthermore, the New Don Pedro project, even with dependable power capacity assured, would operate at an annual *deficit* of $51,000 (J. A. 667) for the entire 50-year license period assuming an anticipated 4.5% cost of money. This contrasts sharply with the present annual net value of power from the Districts' existing Don Pedro project of $956,000.

failure of the Commission to adhere to the statutory limitations imposed by Congress in the Federal Power Act as well as the Raker Act upon which the Districts have relied for years in developing their irrigated economies.

For the above reasons, as well as those set forth in their petition, the Districts pray that the Court grant certiorari.

Respectfully submitted,

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